In the Supreme Court of the United States

No. 490

OCTOBER TERM, 1963.

HUDSON DISTRIBUTORS, INC.,

Appellant,

v.

ELI LILLY & COMPANY,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

JURISDICTIONAL STATEMENT.

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment of the Supreme Court of Ohio entered on June 12, 1963 denying appellant's Application for Rehearing of the judgment of the Supreme Court of Ohio rendered on May 8, 1963 which had affirmed the judgment of the Court of Appeals of Cuyahoga County, Ohio. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW.

The Opinion of the Trial Court in this case, the Court of Common Pleas for Cuyahoga County, Ohio, is not officially reported. It is reported in 1960 C.C.H. Trade Cases Paragraph 69,778. The Opinion is printed in Appendix A hereto beginning at page 28. The judgment entered thereon is printed in Appendix A at page 38.

The Opinion of the Court of Appeals for Cuyahoga County, including the dissent, is reported in 117 Ohio App. 207. This Opinion is printed at pages 39 to 71, Appendix A. The Judgment entered thereon appears in Appendix A at page 71.

The Opinion of the Supreme Court of Ohio, including the dissent, is reported in 174 Ohio St. 487. This Opinion is printed at pages 73 to 86 in Appendix A. The Judgment entered thereon appears in Appendix A at page 86.

JURISDICTION.

The suit was brought by Hudson Distributors, Inc. ("Hudson"), in the Court of Common Pleas of Cuyahoga County, Ohio, against Eli Lilly & Company ("Lilly") under the Declaratory Judgment Statute of Ohio for a judgment declaring the 1959 Fair Trade Act to be null and void as violative of the Supremacy Clause (Article VI, Clause 2) of, and the Fourteenth Amendment to the Constitution of the United States, and repugnant to various provisions of the Constitution of the State of Ohio.

On July 28, 1960 the Court of Common Pleas of Cuyahoga County held that the Fair Trade Act of 1959 was unconstitutional under the Constitution of Ohio. The Federal grounds were not reached. The Court of Appeals for Cuyahoga County by a vote of 2 to 1 reversed the Court of Common Pleas on July 13, 1961 and sustained constitutionality.

Hudson then appealed the decision to the Supreme Court of Ohio. On May 8, 1963, the Ohio Supreme Court, without discussing the federal issues, affirmed the judgment of the Court of Appeals for Cuyahoga County by a vote of three justices in favor of affirmance and four justices against. Although a majority of the justices felt the Statute to be unconstitutional, the Ohio Supreme Court

could not so hold by reason of Article IV, Section 2 of the Ohio Constitution which requires that, except in affirmance of a judgment below, at least six members of the Supreme Court must be of the opinion that a State Statute is unconstitutional before the Court may so declare.

On May 22, 1963, Hudson filed its Petition for Rehearing in the Ohio Supreme Court which was denied by the Court on June 12, 1963. On August 1, 1963, Hudson filed in the Supreme Court of Ohio its Notice of Appeal to the Supreme Court of the United States, copies of which were also filed with the Court of Appeals of Cuyahoga County and the Court of Common Pleas of Cuyahoga County.

The Jurisdiction of the Supreme Court of the United States to review the decision by appeal from the judgment of the Supreme Court of the State of Ohio is conferred by Title 28, United States Code, Section 1257(2). This jurisdiction is sustained by *Metlakatla Indian Community; Annette Islands Reserve v. Egan*, 369 U. S. 45 (1962) and *Reconstruction Finance Corp. v. Beaver County, Pa.*, 328 U. S. 204 (1946).

STATUTES INVOLVED.

The statutory provisions involved are the Miller-Tydings Amendment to the Sherman Act of July 2, 1890, 15 U. S. C. Sec. 1, 50 Stat. 693; the McGuire Act of 1952, 15 U. S. C. Sec. 45(a)(1)-(5), 66 Stat. 632; the Ohio Fair Trade Act of 1959, Ohio Revised Code Secs. 1333.27 through 1333.34, 128 Ohio Laws 698. They are printed in Appendix B hereto.

QUESTIONS PRESENTED.

1. Whether the Ohio Fair Trade Act violates the Supremacy Clause of the Federal Constitution in that:

(a) The Act attempts to repeal Section 5(a)(5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing the proprietor of a trademark or trade name to establish minimum resale prices for wholesalers with whom the proprietor is in competition;

(b) The Act attempts to repeal Section 5(a)(5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing the proprietor of a trademark or trade name to compel its distributors to enter into "horizontal" (i..e at the same level of distribution), price fixing agreements or unlawful boycotting arrangements with other distributors;

(c) The Act attempts to repeal Sections 5 (a) (2), (3), (4) and (5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing the proprietor of a trademark or trade name, who need not necessarily be the owner thereof, to establish minimum resale prices by notice to distributors without the consensual agreement intended by Congress.

2. Whether the Ohio Fair Trade Act is unconstitutional under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution in that the Act confers upon the proprietor of a trademark or trade name a "proprietary interest" in a commodity despite the sale of and receipt of the full price for such commodity with the trademark or trade name affixed thereon, and by reason of such "proprietary interest," empowers the proprietor to compel a remote non-consenting vendee to adhere to a minimum resale price.

3. Whether the federally unconstitutional provisions of the Ohio Fair Trade Act are so commingled and entwined with the remainder of the Act and so inseparable therefrom as to make the entire Act unconstitutional under the Federal Constitution.

STATEMENT OF THE CASE.

On January 22, 1958 the Supreme Court of Ohio nullified the non-signer clause of the Ohio Fair Trade Act of 1936 (O. R. C. Sec. 1333.07) as constituting a deprivation of property without due process of law and permitting the delegation of legislative power to private persons, in contravention of the Ohio Constitution. *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St. 182, 147 N. E. 2d 481.

Following this decision retailers in Ohio, who had not signed fair trade contracts, were free to set retail prices on trademarked and trade name merchandise in conformity with their own pricing structure.

In the summer of 1958 Hudson opened its store in downtown Cleveland, Ohio, where it sold brand name drug merchandise including merchandise manufactured by Lilly at prices below fair trade prices. Hudson has never used brand name merchandise as "bait" or as "loss leaders."

In June of 1959, the legislature of Ohio passed a new fair trade act, to take effect on October 22, 1959. (Appendix B, p. 87.) The new legislation was intended to override the decision of the Supreme Court in the *Bargain Fair* case. See opinion in this case in the Court of Appeals for Cuyahoga County, Appendix A, at p. 39.

Prior to the effective date of the statute, Lilly sent letters to Hudson stating that Lilly had established fair trade prices for its products and that such prices would be enforced when the statute became effective. On the ef-

fective date, Hudson filed suit in the Court of Common Pleas of Cuyahoga County, Ohio, against Lilly for a declaratory judgment to test the constitutionality of the Fair Trade Act of 1959. Lilly filed a cross-petition for injunctive relief, accounting and costs.

In its petition, Hudson attacked the Act as repugnant to various provisions of the Ohio Constitution, and as violative of the Supremacy clause and the Due Process clause of the Fourteenth Amendment to the Federal Constitution. These respective federal and state grounds were briefed, argued and pressed by Hudson in the trial court and in the appellate courts. Hudson's standing to challenge the constitutionality of the Act has never been questioned.

It is undisputed that Hudson purchases no merchandise from Lilly and that all of its requirements are purchased from a wholesaler in Michigan. Lilly has conceded that, apart from the fiat of the "Fair Trade" law, there was no consensual agreement with Hudson for the maintenance of resale prices.

Lilly does not sell directly to retailers. It sells only through wholesalers who in turn resell to retailers. Lilly has established fair trade prices in Ohio at the retail level by entering into written fair trade contracts with retailers and by serving notice of the establishment of such prices upon non-signing retailers.

The Lilly fair trade contracts compel its retailers to boycott those dealers who sell below fair trade prices. Paragraph 6 of the contract provides:

> "6. Retailer agrees not to knowingly sell any of manufacturer's 'Identified Commodities' to any dealer who fails to observe the minimum retail, resale prices established under paragraph 3 hereof."

Hudson brought similar suit against the Upjohn Company ("Upjohn") which had given notice of the establishment of fair trade prices. A cross-petition for relief under the statute was filed in this case.

It was stipulated between Hudson on the one hand, and Lilly and Upjohn on the other, that the cases would go forward on the limited question of constitutionality raised in the Hudson petitions.

The Upjohn and Lilly cases were tried by the Court of Common Pleas of Cuyahoga County in the summer of 1960. On July 28, 1960, the trial judge, after reviewing the entire Fair Trade Act, held the Act to be repugnant to the Ohio Constitution under the *Bargain Fair* decision for the reason that "Regardless of any other changes in the Act, this delegation of legislative authority remains." (Appendix A, p. 37.) The trial court found it unnecessary to pass upon the federal questions.

Upjohn and Lilly appealed to the Court of Appeals for Cuyahoga County, which, by a vote of two judges to one, reversed the Court of Common Pleas on July 13, 1961 and upheld the constitutionality of the statute. In its opinion the Court of Appeals only considered the state constitutional issues. However, the first paragraph of its journal entry states that:

> "1. Sections 1333.27 through 1333.34 of the Ohio Revised Code are valid, lawful, and enforceable enactments of the Ohio General Assembly and are neither in violation of the Constitution of the State of Ohio, *nor in violation of the Constitution af the United States.*" (Appendix A, p. 71.)

Hudson appealed to the Ohio Supreme Court. The Upjohn and Lilly cases were argued together before the court which issued its joint opinion on May 8, 1963, reported in 174 Ohio St. 487. The judgment of the Court of

Appeals was affirmed by a minority of three justices who confined their opinion to the state constitutional issues and held that the infirmities of the non-signer clause nullified in *Bargain Fair* were remedied by the new statute. In summary the Court said: "None of the constitutional attacks on this new Act have merit." (Appendix A, p. 85.)

Inferentially the Ohio Supreme Court sustained constitutionality on federal grounds.

In other Ohio counties final judgments have been entered holding the entire Fair Trade Act to be unconstitutional. See *Helena Rubinstein v. Cinci Vitamin & Cosmetic Distributors, Inc.*, 84 Ohio L. Abs. 143, 167 N. E. 2d 687 (Common Pleas, Hamilton County [Cincinnati], 1960) and *Bulova Watch Co., Inc. v. Ontario Stores of Columbus, Inc.*, 86 Ohio L. Abs., 585, 176 N. E. 2d 527 (Common Pleas, Franklin County [Columbus], 1961) affirmed without opinion by the Court of Appeals for Franklin County, June 19, 1962. That same day, on the ground of the unconstitutionality of the statute, the Franklin County Court of Appeals in nine separate cases, affirmed judgments of the Court of Common Pleas below which had sustained demurrers to and dismissed fair trade petitions filed by various drug and cosmetic manufacturers. *Mead Johnson & Co. v. Columbus Vitamin & Cosmetic Distributors, Inc.*, 1962 C. C. H. Trade Cases, Par. 70,360.

In the *Bulova Watch* case, the Court of Common Pleas of Franklin County held the statute to be repugnant to the Miller-Tydings Act and the McGuire Act, hence unconstitutional under the Supremacy Clause of the United States Constitution and the Court of Appeals for Franklin County affirmed. Both the *Helena Rubinstein* and *Bulova Watch* decisions remain in full force and effect in the second and third most populous counties of Ohio.

THE QUESTIONS ARE SUBSTANTIAL.

This case brings before the Court an attempt by the Legislature of Ohio to repeal a substantial segment of the Federal antitrust laws. If more states enact like legislation, any need for congressional action to enlarge the McGuire Act will largely disappear, for the states will accomplish that which the Congress had thus far declined to do. The Ohio Fair Trade Act of 1959 (*Ohio Revised Code* Sections 1333.27 through 1333.34, 128 Ohio Laws 698), under the guise of authorizing fair trade contracts by "notice," openly invites unlawful horizontal price fixing agreements at every level of distribution in direct contravention of the Miller-Tydings Act and the McGuire Act.

1. It has long been held that the exemptions provided by the Miller-Tydings Act and the McGuire Act, are in derogation of the antitrust laws and must be strictly construed. *Ethyl Corporation v. United States*, 309 U. S. 436 (1940); *United States v. Univis*, 316 U. S. 241 (1942); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 (1951). In the case of *United States v. McKesson & Robbins*, 351 U. S. 305 (1956) this Court stated at p. 316:

> "Congress has marked the limitation beyond which price fixing cannot go. We are not only bound by these limitations but we are bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy."

Both of these exempting statutes expressly forbid horizontal price fixing agreements, arrangements and combinations.[1]

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[1] The Miller-Tydings Act provides in part:

"that the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein

(*Continued on following page*)

This Court has expressly held in *United States v. McKesson & Robbins*, 351 U. S. 305 (1956) that fair trade contracts between a manufacturer, who acts as a wholesaler, and its independent competing wholesalers are void under the antitrust laws. The doctrine of *McKesson & Robbins* was extended to prohibit fair trade contracts between a manufacturer who maintains retail outlets and independent retailers of his products. *Esso Standard Oil Company v. Secatore's Inc.*, 246 F. 2d 17 (1st Cir., 1957). The concurring opinion of Judge Aldrich in the *Secatore's* case expressed the view that actual competition is not necessary to nullify such contracts. By the same token, nonsigners of such contracts are without obligation to honor fair trade prices.

The Legislature of Ohio, in passing the Fair Trade Act of 1959, gave no consideration whatever to the strict limitations of the antitrust law exemptions provided by the Miller-Tydings Act and the McGuire Act. It enacted a statute which expressly permits horizontal price fixing in Ohio, the Federal antitrust laws as construed by this Court notwithstanding.

Horizontal price fixing is expressly authorized at the

(*Continued from preceding page*)

involved, *between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other*." (Emphasis supplied.)

This prohibition is reaffirmed by the McGuire Act Section 5(a) (5), which states:

"Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices of any commodity referred to in paragraph (2) of this subsection, *between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other*." (Emphasis supplied.)

wholesale level by Ohio Revised Code Section 1333.29 (A), which provides in part:

"A proprietor may so establish such minimum resale prices for his wholesale distributors, notwithstanding section 1333.34 of the Revised Code, *even though he sells such commodity to retailers in competition with such wholesale distributors*, if such sales to retailers are made at prices not less than those he establishes for such wholesale distributors for comparable sales." (Emphasis supplied.)

This provision is apparently designed to suit the convenience of many integrated manufacturers who sell directly to retailers, while at the same time selling to wholesalers with whom they compete for the retailer's business.[2]

In an apparent effort to stop the "diverting" of fair-traded merchandise to cut-rate outlets, the legislature enacted further provisions granting carte blanche to horizontal price fixing at *every* level of distribution. The statute defines a distributor as "Any person who acquires commodities for the purpose of resale." Revised Code Section 1333.28 (E). It is axiomatic that this definition encompasses businessmen at the same functional level of distribution, including those in actual competition with one another.

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[2] In an article entitled "Fair Trade, Alias 'Quality Stabilization': Status, Problems and Prospects" by Professor Glen E. Weston appearing in 22 *A.B.A. Antitrust Section* 76 (1963) at pages 93-94 Professor Weston analyzes proposed New York legislation which is virtually identical with O. R. C. Sec. 1333.29 (A):

"One particularly questionable feature of the bill would permit a manufacturer-wholesaler to make Fair Trade agreements with its own competing wholesalers so long as the manufacturer-wholesaler does not cut prices and does not wholesale products of other brand owners. This appears to be based on a narrow reading of the *McKesson* rule, limiting it to facts existing in that case but which were not regarded as significant by the Supreme Court. This provision would seem to be of doubtful validity because it probably conflicts with the Supreme Court's interpretation of the McGuire Act."

Under the aegis of Revised Code Section 1333.29(B) (2), a proprietor can agree with a distributor of his product that such distributor

> "will require from any distributor to whom he may resell such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which such distributor resells *and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell;*"

Ohio Revised Code Section 1333.29(B) (3) permits the proprietor to make a like promise to the distributor that the *proprietor*

> "* * * will require from any other distributor to whom he may sell other items of such commodity an agreement that such distributor *will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell.*"

By the mechanisms provided in these statutory sections, a proprietor can deputize and compel every person in his distribution system to assist in the enforcement of fair trade prices, both inside and outside of Ohio. The stream of interstate and intrastate commerce at wholesale and retail levels is effectively dammed up unless resale is effected within lines demarcated by the proprietor, i.e.:

(a) resale by the initial vendee at the fair trade price for his particular level of distribution; and

(b) resale to subsequent vendees who observe fair trade at their respective levels of distribution.

Upon a proprietor's invoking the statutory scheme, a wholesaler may not sell the trademarked goods to

another wholesaler, nor may a retailer sell to another retailer except on pain of first exacting an agreement as to the price at which the respective vendee will resell. This is indeed the very evil prohibited by the federal enabling legislation. The unlawful clogging of the flow of interstate commerce would appear to be self-evident, cf. *United States v. Utah Pharmaceutical Assn.*, 201 F. Supp. 29 (1962), *affirmed without opinion*, 371 U. S. 949.

It would seem crystal clear that the Ohio Legislature has misconceived its function in the federal scheme of things.

The Lilly fair trade contract, in reliance on the shield provided by these sections, compels its retailers in Ohio to boycott price cutters as a vital link in the Lilly fair trade enforcement chain. Paragraph 6 of the contract provides:

> "6. Retailer agrees not to knowingly sell any of Manufacturer's 'Identified Commodities' to any dealer who fails to observe the minimum retail, resale prices established under paragraph three hereof."

These provisions are patently unlawful under the antitrust laws. *United States v. Parke-Davis & Company*, 365 U. S. 29 (1960).

The Ohio Legislature has no power to enlarge the scope of the Miller-Tydings Act and the McGuire Act in order to permit horizontal price fixing both inside and outside the State of Ohio. Power to amend the antitrust laws is vested solely with the Congress. In the face of a growing number of state Supreme Court decisions nullifying state fair trade laws, bills have been introduced with regularity in Congress to enact national fair trade legislation. In the more recent sessions of Congress, these have been designated as "Quality Stabilization" bills. Each of these bills has provisions amending the antitrust laws to permit horizontal price fixing.

On September 12, 1962, the House Committee on Interstate and Foreign Commerce reported on H. J. Res.

636 in Report No. 2352. Section 14 of this bill expressly sanctions horizontal price fixing by providing:

> "(14) All such rights and remedies provided in paragraphs (7) to (14), inclusive, shall *be also available to any owner of a brand, name, or trademark who, in the sale of goods identified by such brand, name, or trademark shall compete, at any level of distribution, with any reseller offering such goods*: Provided, That such owner shall sell such identified goods at any level of distribution only at the price or within the price range currently established by such owner for that level of distribution." (Emphasis supplied.)

The House committee was not at all hesitant in explaining the purpose of paragraph 14. The report on H. J. Res. 636 states at page 15:

> "* * * *This is intended to overrule the so-called McKesson & Robbins doctrine* (see 351 U. S. 305), *in that the right of a brandname owner to establish prices shall not be denied in cases where the owner engages in multiple distribution, even if he sells in competition with his reseller customers.* Such would be the case if a brandname owner, manufacturing a trademarked commodity, also operated retail stores, at the same time selling to wholesalers and retailers." (Emphasis supplied.)

Before the Ohio General Assembly can constitutionally move to legalize horizontal price fixing, it must first await appropriate enabling legislation by the Congress. In its zeal to overcome the *Union Carbide and Carbon Corp. v. Bargain Fair, Inc.* decision, *supra*, the Ohio legislature acted precipitously and wholly beyond the bounds of Federal sanction. Almost four years have elapsed since the passage of the Fair Trade Act of 1959 and the Congress has still seen fit to retain the Miller-Tydings Act and the McGuire Act in their original form.

Upjohn has availed itself of the horizontal price-fixing provisions of the Ohio Act by entering into agreements with wholesalers of its products with whom it competes and by fixing wholesale resale prices to retailers. Upjohn calls these agreements "del credere agency" contracts. However, according to the branch sales manager of its Cleveland District, Upjohn regards wholesale pricing catalogues furnished to such wholesalers as fair trade wholesale schedules. The titles given to these agreements with wholesalers cannot mitigate their true nature as horizontal price-fixing agreements among competing wholesalers and manufacturers in violation of the Sherman Act. *United States v. Masonite Corp.*, 316 U. S. 265 (1942).

2. The Miller-Tydings Act and McGuire Act exempted from the antitrust laws *contracts* or *agreements* which meet specific standards provided therein. In addition, the McGuire Act in section 5(a)(3) sanctions rights of action created by any state in favor of trademark or trade name owners against any person offering or selling commodities at prices less than those prescribed by fair trade *contracts* or *agreements*, whether or not the offending person is a party to any such *contract* or *agreement*. When Congress enacted these laws, it intended that as a prerequisite to enforcement against nonsigners, there first be in existence *contracts* or *agreements* voluntarily entered into establishing fair trade prices.

This Court in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 at 388, explained what these words mean as they appear in the Miller-Tydings Act:

> "*The Act sanctions only 'contracts or agreements.' If a distributor and one or more retailers want to agree, combine or conspire to fix a minimum price, they can do so if state law permits.* Their contract, combination or conspiracy—hitherto illegal—is made lawful.

"They can fix minimum prices pursuant to their contract or agreement with impunity. *When they seek, however, to impose price-fixing on persons who have not contracted or agreed to the scheme, the situation is vastly different.* That is not following the path of consensual agreement; *that is resort to coercion.*" (Emphasis supplied.)

The Miller-Tydings requirement of fair trade "contracts or agreements" was reenacted without change in the McGuire Act where the statutory phrase is reiterated at least seven times.

Notwithstanding the clear intention of Congress, the Legislature of Ohio decided to devise its own criteria for contracts or agreements. Permeating the Fair Trade Act of 1959 is a dogma that contracts to abide by fair trade prices no longer require the consent of the respective parties.

In the decision below, the Ohio Supreme Court at 174 Ohio St. 488 recognized that without the "contract by notice" provision, the Fair Trade Act of 1959 is meaningless.

> "*The heart of the new act, the implied contract doctrine, is spelled out in Section 1333.28(1), Revised Code.* 'Contract' is defined therein as 'any agreement, written or verbal, or arising from the acts of the parties.' That section provides further that a person who acquired a commodity 'directly from the proprietor or otherwise' after actual notice that the proprietor has established a minimum resale price is bound to observe that price; and that such a person by accepting the commodity 'shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor.'"

Under the provision of Revised Code Section 1333.29 (A), mere notice is sufficient. That this conception is totally inimical to and incompatible with the express word-

ing of the Federal antitrust laws has been recognized by the courts of Franklin County, Ohio in the case of *Bulova Watch Co., Inc. v. Ontario Stores of Columbus, Inc.*, 86 Ohio L. Abs. 585, 176 N. E. 2d 527 (1961), affirmed without opinion by the Court of Appeals for Franklin County on June 19, 1962.[3]

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[3] At 86 Ohio L. Abs. 598-599, the court observed:

"One other aspect of this case should be mentioned. As mentioned before, the Miller-Tydings Act exempted from the Sherman Act only 'contracts and agreements' prescribing minimum resale prices. It is clear, we believe, from the Opinion of the Court in the *Schwegmann* case that this Act authorized *only* contracts in the sense of truly consensual agreements without resort to coercion or compulsion, including state legislative compulsion. *In other words, we think it clear that, at least in the absence of the McGuire Act, actions taken under the 1959 Ohio Act to establish minimum resale prices would be in violation of the Sherman Act,* for the reason that a legislatively established 'agreement,' absent true common law 'mutual assent' or 'meeting of the minds,' would not come within the purview of the words 'contracts or agreements' as contained in the *Miller-Tydings Act.* See also *Johnson & Johnson v. Charmley Drug Co., supra.*

"*The McGuire Act, Title 15, Sec. 45, P. (2d), U. S. C., also refers to 'contracts or agreements' and must be given the same meaning.* Then in Par. (3) it makes lawful the enforcement of any right created by state law which, in substance, provides that wilfully and knowingly selling at less than the price 'prescribed in *such contracts or agreements*' is actionable 'whether the person so * * * selling is or is not a party to *such a contract* or *agreement!*' *We think it clear that the words 'contract or agreement' as employed in Par. (3) as well as Par. (2) of the McGuire Act, have the same meaning as these same words employed in the Miller-Tydings Act, as construed by the Schwegmann case.*

"This situation has given rise to the proposed Harris Act, (H. R. 1253), which would amend the McGuire Act to permit the establishing of minimum resale prices by notice.

"*Thus it would appear that the provision of the 1959 Ohio Act* requiring *no* 'contracts or agreements' within the purview of the Miller-Tydings Act or the McGuire Act, *would not fall within the scope of such acts and any minimum resale prices established without such 'contracts or agreements' would be in violation of the Sherman Act.*" (Emphasis added.)

The statute as interpreted by the court below makes short shrift of the consensual basis for fair trade "contracts or agreements" intended by Congress. The "contract by notice" provisions of the Ohio Act have as much suggestion of consent as a military command.

Under Revised Code Section 1333.30, this notice, which of itself constitutes a contract, may be imparted by mail, through advertising, by means of attaching prices to the merchandise, or even orally.

Revised Code Section 1333.28(I) provides that a distributor who accepts merchandise with notice that fair trade prices have been established

> *"shall thereby enter into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefore by such proprietor."*

whether or not he deals directly with the manufacturer.

Hudson has done everything within its power to reject any fair trade contracts with Lilly. It purchased no merchandise from this company and had no direct dealings with it. By the institution of the within declaratory judgment litigation, Hudson could hardly have manifested its intentions more clearly. Nevertheless, Lilly has sued Hudson for the enforcement of fair trade prices contending that Lilly and Hudson have entered into fair trade contracts as defined by the Ohio statute.

The Congress has recognized that the Miller-Tydings Act and the McGuire Act forbid contracts by *notice*. In 1959, prior to the effective date of the Ohio Fair Trade Act, the "Harris Bill" and like legislation to establish a national fair trade program were before the House Committee on Interstate and Foreign Commerce. The Harris Bill (H. R. 1253) would amend the McGuire Act to au-

thorize state legislation permitting the establishment of minimum resale prices by *notice* in addition to the presently authorized means, to wit, by contracts or agreements. The Committee report on H. R. 1253, H. R. Rep. No. 467, dated June 9, 1959, specifically recognized that as of that time notices had no efficacy in establishing fair trade prices. At page 18 of the Report appears the following explanation of a section of the Bill which would permit the establishment of fair trade prices by *notice*:

> "The only change proposed in paragraphs (2), (3) and (4) is to add a reference to 'notices' in the provisions referring to contracts and agreements. *This change is made so that where a State law permits a manufacturer to establish a stipulated or minimum resale price by the giving of notice, the McGuire Act provisions will apply to the same extent that they now do in the case of State laws which permit the establishment of such prices by contracts or agreements between manufacturers and their distributors.* The committee has been informed that Virginia has modified its Fair Trade Act so as to permit the establishment of stipulated or minimum prices by notice." (Emphasis supplied.)

The Harris Bill never came to a vote. The requirement of the Miller-Tydings Act and the McGuire Act that there be contracts or agreements based upon actual consent remains unchanged.[4]

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[4] In his article appearing in 22 *A. B. A. Antitrust Section* 76 *supra* at pages 92-93, Professor Weston concurs in appellant's belief that the notice provisions of the Ohio Fair Trade Act are outside the exemption of the McGuire Act:

> "There is some doubt whether the Virginia-Ohio type of statute is within the exemption granted by the McGuire Act. The McGuire Act grants its exemption only for 'contracts or agreements' or enforcement of rights of action permitted by state law for selling below prices prescribed in 'such con-

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3. In seeking to create justification for the extensive and unlawful marketing powers retained by the "proprietor," the Ohio Fair Trade Act also resorts to a legal "sleight-of-hand" by way of justification of vertical and horizontal price-fixing. The Act borrows the "property" language of the trade-mark cases preventing interference with the legitimate functions of trade-marks. The Act confers upon the "proprietor" of a trade-mark or trade name a "proprietary interest" in commodities bearing such an identification so long as the commodities retain the markings. Revised Code, Section 1333.31. By reason of this "proprietary interest" the proprietor, who may be a third person designated by the owner of the trade-mark, can compel a remote nonconsenting vendee to adhere to a minimum resale price despite the vendor's sale and receipt of the full purchase price for such commodity.

Having the authority to fix retail prices by notice, the proprietor has the power to take away from the retailer or wholesaler his basic constitutional business freedoms—to buy and resell any products, including Upjohn's in the regular course of commerce; to resell them at the price which he chooses in or out of Ohio; and to conduct his daily

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tracts or agreements.' The Virginia statute provides for 'notice' of the resale price which becomes a 'contract' upon acceptance of the goods with notice. The Ohio statute specifically states that it is lawful for a trademark proprietor to 'establish and control by notice to distributors or by contract' stipulated minimum prices. The Ohio statute would be even more questionable as apparently construed by a minority of its Supreme Court as creating a proprietary interest in the trademark owner in goods that are purchased in another state. Under the doctrine of strict construction of the McGuire Act there is room for argument as to whether these statutes exceed the limited scope of the exemption. For these reasons, H. R. 1253 in the 86th Congress sought to amend the McGuire Act to make it clear that the Virginia and Ohio laws were within the exemption."

business affairs free from the extensive pricing and marketing restraints sought to be imposed by the statute.

The Department of Justice has clearly stated its opinion that the proprietary interest provision of the Quality Stabilization Bill of 1962 (H. J. Res. 636)

> "* * * destroys common law property concepts by enabling a person to sell his property and still maintain significant control over it."

Transcript of Hearings on the Quality Stabilization Bill before a Subcommittee of the House of Representatives Committee on Interstate and Foreign Commerce, 87th Congress, 2nd Session p. 337; testimony of Lee Loevinger, Assistant Attorney General, Antitrust Division, Department of Justice.

The Federal Trade Commission, in commenting upon the proposed Harris Bill of 1959 (H. R. 1253), expressed considerable alarm at a section of the bill closely akin to the "proprietary interest" clauses of the Ohio statute. In its report to the House Committee on Interstate and Foreign Commerce, the Commission stated:

> "The price control permitted to a proprietor by H. R.'s 768 and 1253 would not depend upon any agreement between the proprietor and a distributor, but could be accomplished by unilateral decision and notice by the proprietor. H. R. 1253 would go further by explicitly permitting any manufacturer of branded merchandise to delegate to another person 'the sole authority to establish within the United States stipulated or minimum resale prices' for the manufacturer's merchandise. *This bill would constitute significantly more radical departure from our traditional notions of a free market than any of the previous resale price maintenance exceptions to the antitrust laws contained in the Miller-Tydings or Mc-*

Guire Acts." Report No. 467 to accompany H. R. 1253, pp. 28-29. (Emphasis supplied.)

Concern was also voiced by the Department of Commerce, which made the following observation in its letter to the House Committee on the Harris Bill:

> "Further, it would specifically establish a retention of a proprietary interest by the manufacturer after outright sale of his goods and during a succession of changes of ownership at all levels of trade. *In our opinion this would be a dangerous precedent, contrary to current concepts of property rights.*" Report No. 467 to accompany H. R. 1253, p. 26. (Emphasis supplied.)

The attempt in the Fair Trade Act of 1959 to retain in the proprietor power to determine prices for merchandise after its sale to retailers, possibly through the hands of several middlemen, creates an erroneous inference that somehow sale of the commodity has been incomplete; that a trade-mark is in the nature of a covenant running with the land.

The Fair Trade Act of 1959, within its framework of "contracts by notice" and "proprietary interest" effectively deprives Hudson and other retailers of their basic property rights without due process of law and without just compensation in contravention of the 14th Amendment to the United States Constitution.[5]

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[5] This was the express holding of Judge Leach in *Bulova Watch Co., Inc. v. Ontario Stores of Columbus, Inc.* 86 Ohio L. Abs. 585 at 598:

> "We have not overlooked the contentions of counsel, including the assertion that the 1959 Act has either created or recognized a property right in the commodity *itself* after he has sold it to distributors, so long as the trade-mark or trade name remains thereon. Sec. 1333.31 R. C. *Standing alone, we would doubt the authority of the General Assembly to so create a property right.* But this provision does not stand alone. It is but part of a legislative scheme designed as to

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4. On October 9, 1961, this Court dismissed an appeal in the case of *The Standard Drug Co., Inc., v. General Electric Co.*, 202 Va. 367, 117 S. E. 2d 289, appeal dis-

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its end result to compel persons to abide by minimum resale prices established by private persons, not to create property rights as such. In effect, it is but a legislative statement of a reason why it felt it had the power to regulate by such means. In *Union Carbide this same reason was urged upon the Court and rejected.*" (Emphasis supplied.)

The Wyoming Supreme Court held likewise in *Bulova Watch Co. v. Zale Jewelry Co. of Cheyenne*, 1962 C. C. H. Trade Cases, Par. 70,317 at pages 76,277 to 76,278:

"It would seem to be an unjustifiable, untenable and somewhat absurd legal fiction to say that by simply inscribing his trade-mark upon, attaching it to, or accompanying it with an article a producer obtains or retains a divisible and separate title to the trade-mark which does not pass with the marketing and delivery of the commodity itself to the buyer. When a producer elects to identify his product with a trade-mark and launches it into the marts of trade, he has created and sold an entity—a unit—an integrated article—which its purchaser is not required to destroy or deface in order to lawfully market it at a price suitable to him, provided only that he has not offended antidiscrimination laws. If the producer does not want to sell the product bearing his trade-mark, it is his privilege to refrain from so doing. And when he does so identify his product, he is privileged to determine the price which he is willing to accept for it as a trade-marked commodity. He may fix one price for the article with his trade-mark and accept a different price for an identical article not bearing his trade-mark. In either case he sells that which he wants to sell and obtains the price he asks for what he sells. *However, the commodity he sells embodies the entire article, including whatever he has added to it, or placed upon it, or which accompanies it.* He has been paid the full price demanded by him. When such a sale is made, the seller gives into the buyer's possession everything which he has placed upon or with the object of sale. He retains no part of it. If there is any merit at all in the theory of continuing separate identity and ownership of the trade-mark as distinguished from the article itself, a simple answer is that *by affixing to or accompanying with the object of sale the owner's trade-mark, and placing the commodity thus identified upon the market, the producer or distributor has offered and sold all his interest in that portion of his trade-mark which he placed in use upon or with the article sold,* and in so doing has consented to its continued use by all purchasers." (Italics supplied.)

missed 368 U. S. 4. The *Standard Drug* case involved the Virginia Fair Trade Act of 1958.

The Virginia statute is materially different from the Ohio Act, and omits the provisions of the Ohio law which give rise to the substantial Constitutional issues under the Supremacy clause and Due Process clause.

(a) Subsequent to the decision of the *Standard Drug* case, the case of *Bulova Watch Co. v. Zale-Norfolk, Inc. Jewelers Co.,* File No. 2570 was decided in the Court of Law and Chancery, City of Norfolk, Virginia on August 18, 1961. This case held that the "Notice of Minimum Resale Price" provision of the Virginia statute is binding only upon a merchant who, with notice of the price, buys *directly* from the fair-trader.

Where a trade-marked commodity is purchased *directly* from the fair-trading vendor, consent by the purchaser to adhere to the minimum resale price can be reasonably inferred.

In Ohio the notice is binding upon *any purchaser*, direct or remote, of the trademarked goods, and consent to the fair trade price or the lack thereof is entirely immaterial.

(b) The Virginia statute does not contain the horizontal price fixing and restrictive marketing provisions which permeate the Ohio statute.

(c) Nothing in the Virginia statute resembles the provisions of the Ohio Act which create a "proprietary interest" in the trademark owner sufficient to empower him to dictate unilaterally resale prices through the various levels of distribution.

The decision by the Ohio Supreme Court below would create in the proprietor, rights which are far greater than

those now enjoyed by the holder of a patent. In *Sunbeam Corporation v. Wentling*, 192 F. 2d 7 (3rd Cir., 1951), at page 9 the Court stated:

> "A patentee is given a monopoly by legal grant. But even a patentee, who can exclude everyone else from making his patented article, cannot control the price at which others may sell his articles to consumers. The protection given to the owner of a trademark certainly should not be greater than that given to the holder of a legal monopoly, the patentee."

In *United States v. Univis Lens Co.*, 316 U. S. 241, at 250 (1942) the Court held that a patentee could not control the alienability of his commodity after he had sold it. See also *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436 (1940).

A fortiori an owner of a trade-mark cannot do what is forbidden to a patentee. *United States v. Bausch & Lomb Co.*, 321 U. S. 707 (1944).

The Lilly fair trade program in Ohio is built upon a dual foundation: on the one hand, a series of price lists are delivered to the retail trade which become "contracts by notice" with each "distributor" by statutory fiat, and on the other, separate forms of signed fair trade agreements with retailers. By statutory definition in the Ohio Fair Trade Act, both the express and "notice" forms of contracts have the same legal effect. Both draw their life blood from foundations of unlawful horizontal price fixing and illegal restrictive marketing practices. Such contracts, whether express or by notice, are wholly void and unenforcible by the express terms of Section 5 (a) (5) of the McGuire Act. By the express mandate of the McGuire Act they may not serve as the bases for action against Hudson.

Between 1949 and the date of the ruling of the Supreme Court of Ohio in the case at bar, the Supreme Courts of 23 states declined to give effect to their respective fair trade laws; four state Supreme Courts held such legislation to be wholly unconstitutional and nineteen rulings declined to give effect to the typical "nonsigner" provisions of state fair trade laws, in the form authorized by the federal enabling legislation, the McGuire Act.

In a last desperate effort to circumvent the trend of judicial decisions, the Ohio Legislature has resorted to a new and sweeping variation of fair trade legislation, which may be constitutionally enacted solely by the Congress. The parallels between the new Ohio legislation and the proposed "fair trade" or "quality stabilization" legislation of the last five years are too obvious for extended comment. The recognition by the Congress that it alone may enact the legislation promulgated by the Ohio Legislature, clearly reveals the violation by the Ohio Fair Trade Act of the Supremacy Clause of the Federal Constitution.

Unless this Court defines the limits beyond which state legislatures may not transgress in reenacting fair trade laws, it is highly probable that these legislatures will yield to the enormous pressure exerted by fair trade proponents and will follow the lead of Ohio. This would open the gates to a flood of new state legislation aimed at overturning major segments of the federal antitrust laws as interpreted by this Court in the *McKesson & Robbins* and *Schwegmann* cases.[6]

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[6] Legislation analogous to the Ohio Fair Trade Act was introduced to the New York Legislature in 1962. ("A Proposed New York State Fair Competitive Practices Act," Assembly Bill No. 704 and Senate Bill No. 1652.) The bill passed the Assembly but failed in the Senate. In the current term the Assembly failed to pass the bill.

CONCLUSION.

It is therefore respectfully urged that the questions raised by this appeal are substantial; that the federal issues involved are of great public concern; and that this Court should review the decision of the Supreme Court of Ohio in this case.

Respectfully submitted,

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APPENDIX A.

Opinion of the Court of Common Pleas for Cuyahoga County.

(Case Nos. 727,805 and 730,118.)

Decided July 28, 1960.

McNeill, Judge By Assignment [*In full text*]: These cases, although heard separately by the court, involve the same questions, and will be treated together. The plaintiff is seeking declaratory judgments questioning the constitutionality of the so-called Fair Trade Laws. Defendants, by cross petition, seek to enjoin plaintiff from selling their products at less than the fair trade price. In both cases, the evidence was submitted to the court upon stipulations and upon affidavits and counter-affidavits, it being agreed that such affidavits should be regarded as the testimony of the witnesses as if they were present. No question is raised that the parties are not all properly before the court, and that the court has jurisdiction over the subject matter. There is no dispute that plaintiff, after knowing the fair trade price imposed by defendants; sold the articles at retail for less than said price.

Originally it was held that price fixing under the Fair Trade Act violated the Sherman Anti-Trust Act. An amendment was made thereto granting exception in fair trade cases, and this was held unconstitutional as to nonsigners. A further exception to the Sherman Anti-Trust Act was enacted which now permits states to adopt fair trade laws, if they are legal under State constitutions.

In Ohio, the Valentine Act, paralleling the Sherman Act, prohibits the setting of retail prices. The first Fair Trade Act provided an exception, and this was declared unconstitutional by the Supreme Court in the case of *Union Carbide v. Bargain Fair*, 167 O. S. 182 in January,

1958, because of its nonsigner provisions. Thereafter, in 1958, the legislature adopted the new act, R. C. § 1333.27, *et seq.*

The gist of the new act is that a producer or distributer of any article, or any person designated by either, if the article is trade-marked or given a trade name by either the producer or distributor, has a proprietary interest in the product so long as the commodity is identified by its trade-mark or trade name, and because of such proprietary interest, such producer, distributor or designee may designate a minimum sales price for such product. Anyone they contract with, or anyone else who buys with notice of these terms, even though not directly contracting with such party, as a matter of law is deemed to have agreed not to sell below the minimum sales price, and the remedies of the Act then apply. The minimum sale price may be maintained throughout the whole process of distribution until it reaches the consumer. One other new feature is the provision that if the seller has removed from such commodity all traces of the identifying trade-mark or name, he may then sell it at any price he desires.

This very theory of proprietary interest was argued before the Supreme Court and was discussed at length in their opinion in *Union Carbide, supra,* at page 184, and rejected by the court. Thus, the question arises, does this enactment by the legislature breathe constitutionality into the law that was previously rejected by the Supreme Court?

However, in 16 *C. J. S.* § 71, at page 26, is stated:

> "thus (legislature) may not by means of statutory enactment do indirectly that which it is prohibited from doing directly, by constitutional provison; nor can it do by implication that which it cannot do by express enactment. It is not, however, an illegal

evasion to accomplish a desired result, lawful in itself, by discovering a legal way to do it."

The court is not discussing the economic reasons for the enactment of the statute, so strongly urged in the affidavits, as the court will accept these facts as being true. The legislature, in R. C. § 1333.27 has set forth its reason and purpose, which includes the economic reasons and necessity for enacting the legislation. However, this Court, being a lower court, must necessarily examine the previous case of the Supreme Court, *Union Carbide, supra*, to determine whether any of those evils remain.

It is urged that in considering the constitutionality of the statute that the court must presume its constitutionality, unless it is clearly shown otherwise. However, that presumption does not always prevail.

> "The presumption does not apply, or its operation is given a narrower scope, where the statute shows on its face a violation of constitutional provisions; nor does it apply where such a presumption would defeat constitutional provisions. No presumption of constitutionality attaches to the action of a private group when its action is challenged by a person injuriously affected by it; similarly, when there is a delegation of the legislative power to a private individual who comes in conflict with another private individual of equal standing before the courts, the reason for indulging so strongly in the presumption of constitutionality of the statute involved ceases to exist." 16 C. J. S. § 99, page 408.

This appears to be the law of Ohio. *Belden v. Union Central Life Ins. Co.*, 24 O. O. 151; 143 O. S. 329.

In the *Union Carbide* case, *supra*, one of the grounds for the unconstitutionality of the old act, as stated by the Court, was:

"* * * and in addition, delegates legislative power and discretion to private persons."

There are many differences between the old act and the new act, but is there any material change in this respect?

Under the old act a manufacturer had the right to put a trade-mark on its goods if it desired. This right also ensued to the distributor. If they were trade-marked, they had the right to fair trade or not fair trade the articles. At this point, it would appear there was no undue delegation of authority, as our statutes are replete with instances where persons may decide either to place themselves within certain legislative actions, or not to do so; for example, the mechanic's lien laws. However, in such case, if a person does decide to take advantage of the mechanic's lien law, he then has no other choice, but the law falls and operates on him. This is not true in the fair trade cases, as, in addition to these choices, the producer or distributor has the choice of what price he will set, both for wholesalers and retailers, and after setting the price, he immediately has another choice of changing such fair trade price, or removing it; and even then he may fair trade and set his price again. In this respect, there is no difference between the old law and the present law.

In addition, the new law goes one step further in not only permitting a producer or a distributor from fixing the trade-mark and setting the price, but further provides that this right may be delegated. The new act does provide that a party may remove evidence of the trade-mark or name and then sell the article at any price he desires. This is mainly a paper right, as the proprietor can eliminate this right by making his mark on the merchandise in such a way that it cannot be removed. It may be, and often is, stamped in hard goods, and in many cases is moulded in

each individual pill. If this is done, the right disappears and this is at the option of the proprietor.

There is a long line of decisions in Ohio on delegation of legislative power. Some are helpful and some are not helpful. "Whenever the question is raised, the answer must be found in the language of the act; the attack without regard to extraneous facts." *Belden v. Central Life Insurance Company*, 143 O. S. 329 (Appeal dismissed: 323 U. S. 674).

Section 1, Article 2 of the State Constitution provides:

> "The legislative power of this state shall be vested in the General Assembly * * *."

It is clear the general assembly cannot delegate its legislative power, and any attempt to do so is unconstitutional. See: *Belden v. Insurance Co., supra*, and cases cited therein. In the same case, the Court stated:

> "On the other hand legislative acts granting to a board or an administrative agency quasi-legislative or quasi-judicial power, have been uniformly sustained where the General Assembly has laid down the policy and established the standards while leaving to an administrative agency the making of subordinate rules within prescribed limits and the determination of facts to which the legislative policy is to apply."

There is a much broader rule in reference to delegation of administrative agencies than there is to individuals, the reasons being necessity of government, and the presumption that a public official will properly exercise this power, he having no individual interest in the matter. This is not true with an individual. Defendants argue that Article VIII, Section 2 is the basis for the Act, but this in no way gives a right to delegate legislative power.

The argument is made that since the power to fix prices was available at common law, the Fair Trade Act

only restores this right; and therefore, cannot be a delegation of legislative power. With this argument, the court cannot agree. The act is not to nullify the Valentine Act, but to be an exception to it. The Fair Trade Act only has existence because Congress made such acts an exception to the Sherman Act. Its existence does not stem from a common law right, but it stems as a specific exemption to the Sherman Act, and only has life as it fits the exemption. The Fair Trade Act itself rebuts this argument. The legislature specifically granted a proprietary interest in a trade-mark or name, and gave this right to anyone holding this interest to set minimum prices. This right did not exist at common law to the holder or assignee or designee of a trade-mark or name. He may have the right to set prices generally at common law, but not because of his proprietary interest in his trade-mark. For common law rights of trade-marks generally, see: *U. S. v. Timken*, 83 F. Supp. 284 (at p. 315). This right granted to a holder of a trade-mark is greater than that possessed by the holder of a patent. *U. S. v. Masonite*, 62 S. Ct. R. 1070; 316 U. S. 265. This is a specific legislative enactment that gives a holder of a trade-mark or name a right he did not possess previously. This was clearly denoted in the *Union Carbide* case, *supra*.

The statutes construed by other states have held the right to set a minimum price without reference to any standard is a delegation of legislative power. *Remington Arms Co. v. Skaggs*, 345 P. 2d 1085 (Wash.); *Quality Oil v. E. I. DuPont DeNemours & Co.*, 322 P. 2d 731 (Kans.); *Bissell Carpet Sweeper Co. v. Shane*, 143 N. E. 2d 415 (Ind.); *Olin Mathieson Chemical Corp. v. Francis*, 301 P. 2d 139 (Colo.); *Dr. G. H. Tichenor A. Co. v. Schwegmann Bros.* 90 So. 2d 343 (La.); *General Electric Co. v.*

Wahle, 296 P. 2d 635 (Oregon); *McGraw Electric Co. v. Lewis & Smith Drug Co.*, 68 N. W. 2d 608 (Nebraska).

It is true that the Federal Government and some other states have held this not to be a delegation of legislative authority. The Federal decision is not controlling on the State courts as the Fair Trade Act, as an exception to the Sherman Act, depends upon its being constitutional in each state.

Early in Ohio a general distinction as to what may be delegated was set forth in *Cincinnati Railroad Co. v. Commissioners*, 1 O. S. 77. Grants without guides or standards were made to certain administrative officers. See: *Harmon v. State*, 66 O. S. 340; *Srigley v. Woodworth*, 33 O. A. 406. In *Opdyke v. S. & L. Co.*, 157 O. S. 121, at page 154, the Court stated:

> "In making that grant, the General Assembly has imposed conditions and limitations on the exercise of that power, such as the requirement of compliance with federal law and with regulations of the federal agency concerned with the question of whether a particular Ohio corporation should be permitted to become a federal savings and loan association. The imposition of such conditions and limitations on the exercise of the power so granted does not constitute a delegation of legislative power."

There are different standards in considering whether a delegation of power is proper. This depends on whether the delegation is to an individual or to a quasi government body. In *Weber v. Board of Health*, 148 O. S. 339, the Court, at page 396, stated:

> "Ordinarily, in delegating to boards and commissions the authority to make rules and regulations, the General Assembly must establish the legal policy by adopting standards and authorizing the boards and commissions to make their rules in accordance with

such standards. In the picturesque language of Justice Cardozo in his dissenting opinion in *Panama Refining Co. v. Ryan*, 293 U. S. 388, the power conferred must not be 'unconfined and vagrant' and must be 'canalized within banks that keep it from overflowing.' However, it is recognized that there are many occasions where the nature of the problem makes it impossible to lay down standards, and as a result *rule-making bodies* (Italics this Court's) must be allowed a wide discretion without anything as their guide except the general policy of the law-making body and the law that such bodies must not legislate or make rules which are unreasonable, discriminatory, or contrary to constitutional rights."

In this case, there are no guides or standards, no rules or regulations. The very persons who have the most personal interest in the products are granted the right to set its price. Not being quasi governmental bodies, the presumption that they will operate in the proper public interest does not exist. This certainly is "unconfined and vagrant" and may well overflow the banks.

In *Serrer v. The Cigarette Service Co.*, 148 O. S. 513, the court upheld the general right of the legislature to provide that cigarettes could not be sold below cost, but held the specific act unconstitutional because the formula therein provided did not take sufficient variations into consideration. At Page 522 therein, the Court stated:

> "Although in this day and age it can hardly be urged that legislative bodies in the exercise of the police power may not, in the public interest and in the promotion of economic stability, prohibit sales at below cost, the legislation enacted to accomplish such objects must be so phrased as to recognize economies and practices whereby one seller is able to sell particular merchandise at a lower price than a competitor and still not be chargeable with selling below actual cost.""

In this case, there is no formula whatsoever. Certainly if the Supreme Court has held that the legislature by failing to set up a proper formula in dealing with minimum prices acted illegally, a blanket grant of power to a private person to set minimum prices would be without effect.

A recent decision of the Supreme Court, *Remington Arms Co. v. G. E. M. of St. Louis, Inc.*, 102 N. W. 2d 525 touched upon this very problem. At Page 534 therein, the Court stated:

> "In examining the grant of authority to the trade-mark owner it must be conceded that he is given the privilege to place the law in effect and to amend or alter it at his will. He may do this without regard to the interest or welfare of nonsigners or the consumer who represents the public. The law does not provide for any standard or condition as to the necessity for the act. It gives to the trade-mark owner carte blanche authority to make that determination alone. He is not required to consult with anyone. There is no one to review his act."

The Court further states:

> "If we realistically appraise the act for what it is, it should be recognized as a selective price control act which leaves to the manufacturers of trade-mark products the arbitrary right to determine if and when it shall take effect. No standard or yardstick is provided by which such prices are to be determined. It grants to a private party the privilege of creating a right of action for its own benefit or suspending that right at its will. No hearing is provided for to safeguard or protect the unwilling retailer or the consumer. Thus, by virtue of the nonsigner clause the private party in effect may regulate prices as it sees fit. Since one manufacturer and one retailer may fix prices for all retailers, they have the complete power

to fix prices regardless of anyone's interest but their own. * * *"

In the act therein in question, the proprietor of the trade-mark had to enter into a contract with one other person. Under the Ohio Statute, he need contract specifically with no one, only give notice of what price he chooses and then by operation of law, this becomes a part of every contract of sale.

One other question may be raised in reference to delegation of power, which the court is not deciding. The Supreme Court of Oregon, in the case of *General Electric v. Wahle, supra,* held that there is a question whether the legislature itself could set individual fair trade prices for all articles in commerce and place specific prices on each article. The Court held:

> "If the legislature does not have the authority, it certainly cannot give it to anyone else."

No effort is made here to protect the consumer and indirectly the retailer by providing that certain services must be provided; that service personnel must be provided in proportion to the volume of business, as is done with the sellers of new cars or the use of other devices. The problem is very real and needs some solution. However, Fair Trade in Ohio does not appear to be the answer. The Supreme Court, in *Union Carbide, supra,* at Page 186, in giving its reasons for the original acts invalidity stated:

> "* * * in addition, delegates legislative power and discretion to private persons.* * *"

Regardless of any other changes in the act, this delegation of legislative authority remains. This being a lower court, it is bound to follow the dictates of the Supreme Court, and this court does understand this to be its decision.

The court deciding this issue as it has, other questions concerning the act raised in the briefs are not discussed.

Journal Entries prepared and filed this date in accordance herewith.

Judgment of the Court of Common Pleas of Cuyahoga County.

(Dated July 28, 1960.)

(Like Orders filed July 28, 1960, Nos. 727,805 and 730,118.)

This cause came on to be heard upon the pleadings, the evidence, the oral argument of counsel, and upon the briefs submitted by counsel of record and amicus curiae.

The Court finds that it has jurisdiction of the parties hereto, of the subject matter of the action, and that all things have properly been done to bring the subject and all parties before the court.

The Court finds that there has been an enactment in the State of Ohio of R. C. 1333.27-1333.34, inclusive entitled "Fair Trade and Minimum Resale Prices" effective October 22, 1959, and that said act permits a producer or distributor trade-marking or trade-naming an article for retail sale which is in free and open competition with the same general class produced by others and offered for sale in the same general market area, or their designees, to control by notice to distributors, or by contract stipulated minimum resale prices for such commodities; that no standards or limitation of any type is provided to control the discretion of said person setting said price, and that therefore, said act is in violation of Section 1, Article II of the Constitution of the State of Ohio;

That said provisions are an integral and unseparable part of said act and because thereof, R. C. 1333.27-1333.34,

inclusive, are in violation of the Constitution of the State of Ohio, and are of no force and effect; that plaintiff's rights in the sale of its property are affected thereby; and that there is a controversy and judiciable issue before the Court.

It Is Therefore Ordered, Adjudged and Decreed that R. C. 1333.27 to R. C. 1333.34, inclusive, of the State of Ohio, are violative of Section 1, Article II of the Constitution of the State of Ohio, and therefore are void and are not binding upon the plaintiff herein. It is further ordered that the cross petition of defendant be, and the same hereby is dismissed, at the costs of the defendant herein. Exceptions allowed.

Signed: Eugene R. McNeill,
Judge by assignment.

Opinion of the Court of Appeals for Cuyahoga County.

(Appeal Nos. 25,371 and 25,374.)

(Decided July 13, 1961.)

Skeel, J. These appeals come to this Court on questions of law from judgments entered for the plaintiffs, appellees herein, in the Court of Common Pleas of Cuyahoga County. The actions seek a declaratory judgment declaring the Ohio Fair Trade Act invalid and unconstitutional. Both cases involve similar facts and, with the questions to be determined by this Court the same in each case, the appeals will be considered together. The assignment of error is identical in both cases.

> "For its assignment of error, the defendant-appellant asserts that the Court of Common Pleas of Cuyahoga County erred in declaring Sections 1333.27 through 1333.34 of the Ohio Revised Code to be in violation of the Constitution of the State of Ohio, and

therefore void and not binding upon the plaintiff-appellee, and in granting judgment for the plaintiff-appellee on its petition and dismissing the cross-petition of the defendant-appellant."

The plaintiff, in both cases, is the operator of retail stores selling, among other things, pharmaceutical products. The defendant, in each case, is the manufacturer of pharmaceutical items which are distributed to retailers either directly or through wholesalers or jobbers. They do not sell at the retail level. The products manufactured by these defendants for ultimate use and consumption of retail buyers are manufactured and identified under a trademark, trade or brand name, and sold at retail in free and open competition with commodities of the same general class.

These defendants or their distributors have entered into many written contracts with retail pharmaceutical establishments in Ohio, determining the retail resale price for their trademarked or branded commodities and have caused notice of these contracts and the prices therein established to be served on the plaintiff. The defendants, therefore, claim the protection of the Ohio Fair Trade Act. It is alleged in defendants' cross-petitions that the plaintiff, purchasing the defendants' trademarked or trade name or branded products in interstate commerce, with notice of the established retail resale price in Ohio, is continuing to sell such articles (purchased by them after such notice) at retail at cut-rate prices, below the retail price fixed by the defendants, in total disregard of the Fair Trade Act. It is the contention of the plaintiff, among other claims, that the Ohio Fair Trade Act, passed effective October 22, 1959, constitutes a delegation of legislative power to private persons and for that reason is unconstitutional.

The historical background of the Ohio Fair Trade Act began in 1936 upon the passage of what are now known as

Sections 1333.05 to 1333.10, inclusive, of the Revised Code. This legislation followed after the Congress and the Supreme Court of the United States, by successive acts and decisions, dealt with the right of a manufacturer who identified his products by a trade name or trademark to assure the ultimate consumer that such product was manufactured by him, to protect his "goodwill," created by producing quality merchandise as advertised, from the alleged claims of injury to such "goodwill" by price-cutting retailers. There can be no doubt that the buying public is benefited under modern merchandising methods to be able to identify goods either desired or to be avoided by its trade name or trademark. This Court can take notice of the complete change in merchandising methods over the past seventy-five years. From cracker barrel days when manufacturers found their markets in the locality of their business or sales were made to the ultimate consumer through the retailer's reputation, the retailer in turn being the object of the sales activity of manufacturers or wholesalers, to the present period when the manufacturer points his sales activities to attract the attention of the consuming public and the retailer prepares his stock to meet the demands of the buying public as influenced by the direct advertising of the manufacturer, it must follow that the manufacturer's goodwill is an important and valuable factor in the retail market of today. The manufacturer or wholesale distributor, in seeking to attract the public to buy his products, uses his distinctive trademark or trade name by which his goods are identified. So completely have the processes of merchandising consumer goods changed that the Supreme Court of Ohio held in the case of *Rogers v. Toni Home Permanent Co.* (1958), 167 Ohio St., 244, that an action claiming a breach of an express warranty could be maintained against

the manufacturer without privity of contract, that is where the goods were purchased by the consumer from an independent retailer, the buyer (consumer) being induced to buy the manufacturer's product through the manufacturer's direct advertising and consumer sales efforts. On page 248, the court said:

> "Occasions may arise when it is fitting and wholesome to discard legal concepts of the past to meet new conditions and practices of our changing and progressing civilization. Today, many manufacturers of merchandise, including the defendant herein, make extensive use of newspapers, periodicals, signboards, radio and television to advertise their products. The worth, quality and benefits of these products are described in glowing terms and in considerable detail, and the appeal is almost universally directed to the ultimate consumer. Many of these manufactured articles are shipped out in sealed containers by the manufacturer, and the retailers who dispense them to the ultimate consumers are but conduits or outlets through which the manufacturer distributes his goods. The consuming public ordinarily relies exclusively on the representations of the manufacturer in his advertisements. What sensible or sound reason then exists as to why, when the goods purchased by the ultimate consumer on the strength of the advertisements aimed squarely at him do not possess their described qualities and goodness and cause him harm, he should not be permitted to move against the manufacturer to recoup his loss. In our minds no good or valid reason exists for denying him that right. Surely under modern merchandising practices the manufacturer owes a very real obligation toward those who consume or use his products. The warranties made by the manufacturer in his advertisements and by the labels on his products are inducements to the ultimate consumers, and the manufacturer ought to be held to strict accountability to any consumer who buys the product

in reliance on such representations and later suffers injury because the product proves to be defective or deleterious. See Prosser on Torts (2 Ed.), 506, Section 84; 1 Williston on Sales (Rev. Ed.), 648 to 650, Section 244a."

The liability of the manufacturer would be the same even though his goods were purchased from a price-cutter to his claimed detriment. It would be unusual that modern trends in retail merchandising should thus create a direct liability against a manufacturer for breach of warranty in the representations inducing the sale of his goods made by the manufacturer, the sale being made by an independent retailer, and then to refuse such manufacturer the right to protect his property right in his goodwill, the representations which created the inducing cause of the sale, from damages to such property right by the acts of the retailer selling his goods at cut-rate price in violation of the fair-trade price set on the basis of a contract under the Fair Trade Act.

It is the claim of those supporting "Fair Trade" legislation that the goodwill of the manufacturer created by his direct sales efforts, and in maintaining goodwill by the quality of his products, whereby the consuming public seeks out his goods without any sales effort on the part of the retailer whose only part in the transaction is to have the goods available for sale at the selection of the consumer purchaser, is damaged and his product depreciated by retail price-cutting practices.

In an attempt to protect the value of a manufacturer's goodwill, established by his sales efforts (in support of the quality of his product) in relation to his trademarked goods, from the claimed detriment of price-cutting retailers, both the Legislatures of the several states and the Congress of the United States, beginning at about the

turn of the century, have been attempting to provide regulations to protect the manufacturer's property right in his goodwill from detriment due to the uncontrolled action of price-cutting retailers. The basis of these efforts has been to provide by law the conduct between the manufacturer and the retailer acquiring the goods for resale that will create contractual relations between them by which a minimum retail sales price can be established.

The cases on contracts between manufacturer and retailers, whereby the retailer agrees to maintain a retail price set by the owner of trademarked or trade-named goods by which the manufacturer's goods are identified and who, over the years, has, by expending time and capital, developed what is called "goodwill" in relation to his product, these contracts being identified and characterized as supporting "fair trade," have been upheld as between the parties at common law.

However, after the passage of the "Sherman Act" by the Congress of the United States in 1890, the Supreme Court of the United States in *Dr. Miles Medical Co. v. John D. Parks & Sons Co.*, 220 U. S., 373, 55 L. Ed., 502, 31 S. Ct., 376, held that a contract controlling the resale price between a manufacturer and a retail dealer with regard to goods in interstate commerce constituted a violation of the Sherman Act. The results of this case for a time ended legislative attempts to provide against unfair trade practices alleged to result from price cutting.

A reading of the opinion of Mr. Justice Hughes in the *Dr. Miles Medical Co.* case, which was decided in 1911, makes it clear that the only question decided dealt with contracts in restraint of trade in interstate commerce under the Sherman Act. The Dr. Miles Medical Company, the manufacturer of a non-patented, secret formula remedy, attempted to control the price of its products, both

at retail and wholesale, by two forms of restrictive agreements limiting trade in the products of Dr. Miles to those who became parties to either of such contracts. One contract was a consignment entered into with wholesalers, the other was a retail agency contract made with retail dealers throughout the United States. The defendant was a wholesale drug concern that refused to enter into the required contract but procured Dr. Miles' products for sale at cut-rate prices by inducing those having contractual relations with Dr. Miles to breach their contracts. One question presented was the validity of the consignment contract between Dr. Miles and certain jobbers. This question was not clearly considered because the allegations of the complaint as to the manner in which defendant procured the goods were not set out. The complainant relied on two claims, the first being that its product was an article created under a secret process of which the manufacturer was the owner. This claim was held without legal foundation to protect a contract controlling retail prices, under the Sherman Act. The court said that the question concerns not the process of manufacture but rather an article in commerce. The complainant, the court said, could not rely on the protection afforded a patentee derived by a statutory grant. The second claim was that the complainant was entitled to maintain the restrictions by virtue of the fact that the restrictions related to products of its own manufacture. Ordinarily, there is no way to impose restraints on goods after alienation, with one or two recognized exceptions that are not important here. Such claims are void because the seller parted with its whole interest in the property sold to the vendee by the sale. The basis of the decision is that where the manufacturer or jobber attempts to fix a minimum retail price, the result would be to completely

foreclose the free and unrestricted competition between retailers, who are, in fact, the owners of the goods. The court said, at page 405:

> "Whatever right the manufacturer may have to project his control beyond his own sales must depend, not upon an inherent power incident to production and original ownership, but upon agreement."

The court said that contracts in restraint of trade must be considered in the light of commercial needs at the time such contract is made. On page 406 of the opinion, the following, applicable here, appears:

> "* * * As was said by this court in *Gibbs v. Baltimore Gas Co.*, 130 U. S., p. 409, 'The decision in *Mitchel v. Reynolds*, 1 P. Wms., 181; S. C., Smith's Leading Cases, 407, 7th Eng. ed; 8th Am. ed. 756, is the foundation of the rule in relation to the invalidity of contracts in restraint of trade; but as it was made under a condition of things and a state of society, different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it be not involved and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is, whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not unreasonable. * * *.'
>
> "* * * But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the

party in whose favor it is imposed, while at the same time it is in no way injurious to the public."

This view of the law was expressed at a time when trademarks or trade names were not the labels by which the public was induced to select a manufacturer's product because of his direct advertisements and sales efforts, but at a time when the usual action concerning trade names had to do with attempts to fraudently use the labels or trademarks of another. Mr. Justice Oliver Wendell Holmes, in a strong dissenting opinion, suggests that by the slightest change the contract could not be attacked. He states the following:

"* * * If it should make the retail dealers also agents in law as well as in name and retain the title until the goods left their hands I cannot conceive that even the present enthusiasm for regulating the prices to be charged by other people would deny that the owner was acting within his rights. It seems to me that this consideration by itself ought to give us pause.

"But I go farther. There is no statute covering the case; there is no body of precedent that by ineluctable logic requires the conclusion to which the court has come. The conclusion is reached by extending a certain conception of public policy to a new sphere. On such matters we are in perilous country. I think that, at least, it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interferences is very clear. * * *"

And on page 412, Mr. Justice Holmes said:

"* * * I think that we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article (here it is only distribution), as fixing a fair price. What really fixes that is the competition of the conflicting desires. * * * As soon as the price of something that we

want goes above the point at which we are willing to give up other things to have that, we cease to buy it and buy something else. * * * The Dr. Miles Medical Company knows better than we do what will enable it to do the best business. We must assume its retail price to be reasonable, for it is so alleged and the case is here on demurrer; so I see nothing to warrant my assuming that the public will not be served best by the company being allowed to carry out its plan. I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get."

After the *Dr. Miles* case, no attempt seems to have been made to legislate on the question of sanctioning by law agreements coming within the oribt of statutes designated as "Fair Trade Laws" until 1931 when California passed as a part of the Business and Professions Code, Sections 16900 to 16905, inclusive. Section 16902 is similar in context, and in purpose identical, to Section 1333.06 and Section 1333.07, Revised Code, a part of the Ohio Fair Trade Act of 1936.

These sections containing the non-signer clause have been held constitutional in a number of cases in California. *Max Factor & Co. v. Kunsman* (1936), 5 Cal. (2d), 446, 55 P. (2d), 177; *Scovill Mfg. Co. v. Skaggs Pay Less Drug Stores* (1955), 45 Cal. (2d), 881, 291 P. (2d), 936.

The *Factor* case was affirmed on appeal to the United States Supreme Court in 299 U. S., 198, 81 L. Ed., 122, 57 S. Ct., 147, in an opinion by Mr. Justice Sutherland, relying on the *Old Dearborn* case, *infra*.

The Illinois Fair Trade Act of 1935 (Smith-Hurd Rev. Statutes, 121½, paragraph 188 *et seq.*), which in substance

is identical with the Ohio Act of 1936, including the non-signer provision, was challenged in the case of *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.* (1936), 299 U. S., 183, 81 L. Ed., 109, 57 S. Ct., 139, 106 A. L. R., 1476, on the ground that it constituted an unlawful delegation of legislative power and denied equal protection of the laws. Paragraphs 1, 2, and 3 of the headnotes of the Lawyer's Edition report of such case provide as follows:

> "1. Property is not taken without due process, in violation of the Fourteenth Amendment, by a state statute which declares that wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into between persons handling a commodity bearing the trademark, brand or name of the producer or owner and which is in fair and open competition with commodities of the same general class produced by others, for the maintenance of a fixed resale price, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and actionable at the suit of any person damaged thereby, there being nothing in the act to preclude a purchaser from removing the mark or brand from the commodity and then selling it at his own price.
>
> "2. Legislative power is not unconstitutionally delegated by a statute which permits sellers of commodities bearing the trademark, brand or name of the producer or owner to contract with the purchaser for the maintenance of a fixed resale price, and provides that wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract thus entered into, whether the person so advertising, offering for sale or selling is or is not a party thereto, shall be unfair competition and actionable at the suit of any person damaged thereby.

"3. The question whether price cutting by retail dealers in the case of commodities bearing the trade-mark, brand or name of the producer or owner is injurious to the general public is one as to which the legislature's determination is conclusive on the courts."

On pages 194, 195 and 196 of 299 U. S., the court said:

"We find nothing in this situation to justify the contention that there is an unlawful delegation of power to private persons to control the disposition of the property of others, such as was condemned in *Eubank v. Richmond*, 226 U. S., 137, 143; *Seattle Trust Co. v. Roberge*, 278 U. S., 116, 121, 122; and *Carter v. Carter Coal Co.*, 298 U. S., 238, 311. In those cases the property affected had been acquired without any pre-existing restriction in respect of its use or disposition. The imposition of the restriction *in invitum* was authorized after complete and unrestricted ownership had vested in the persons affected. Here, the restriction, already imposed with the knowledge of appellants, ran with the acquisition and conditioned it.

"Nor is Section 2 so arbitrary, unfair or wanting in reason as to result in a denial of due process. We are here dealing not with a commodity alone, but with a commodity plus the brand or trade-mark which it bears as evidence of its origin and of the quality of the commodity for which the brand or trademark stands. Appellants own the commodity; they do not own the mark or the good will that the mark symbolizes. And good will is property in a very real sense, injury to which, like injury to any other species of property, is a proper subject for legislation. Good will is a valuable contributing aid to business—sometimes the most valuable contributing asset of the producer or distributor of commodities. And distinctive trade-marks, labels and brands, are legitimate aids to the creation or enlargement of such

good will. It is well settled that the proprietor of the good will 'is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same, by using his labels and trade-mark without his consent and authority.' *McLean v. Fleming*, 96 U. S., 245, 252. 'Courts afford redress or relief upon the ground that a party has a valuable interest in the good will of his trade or business, and in the trade-marks adopted to maintain and extend it.' *Hanover Milling Co. v. Metcalf*, 240 U. S., 403, 412. The ownership of the good will, we repeat, remains unchanged, notwithstanding the commodity has been parted with. Section 2 of the act does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury. It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the goodwill, and constitutes what the statute denominates 'unfair competition.' See *Liberty Warehouse Co. v. Burley Tobacco Growers' Assn.*, 276 U. S., 71, 91-92, 96-97. There is nothing in the act to preclude the purchaser from removing the mark or brand from the commodity—thus separating the physical property, which he owns, from the good will, which is the property of another—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to that end.

"There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business of the producer and distributor of identified goods, but injurious to the general public as well. The evidence to that effect is voluminous; but it would serve no useful purpose to review the evidence or to enlarge further upon the

subject. True, there is evidence, opinion and argument to the contrary; but it does not concern us to determine where the weight lies. We need say no more than that the question may be regarded as fairly open to differences of opinion."

Following that decision, the Congress of the United States passed the Miller-Tydings Act (15 U. S. Code Section 1) which amended the Sherman Act, providing that "fair trade" contracts in interstate commerce do not constitute a violation of any provision of that act. That act was interpreted by the Supreme Court of the United States in the case of *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S., 384, 95 L. Ed., 1034, 71 S. Ct., 745, 19 A. L. R. (2d), 1119, where the court held in the syllabus:

"a) Price fixing is unlawful *per se* under the Sherman Act.

"b) The Miller-Tydings Act exempts 'contracts or agreements prescribing minimum prices for the resale' of the articles purchased, not 'contracts or agreements' respecting the practices of noncontracting competitors of the contracting retailers.

"c) The history of the Miller-Tydings Act supports the construction here given it."

A complete history of the fate of "Fair Trade" statutes and cases, beginning with the *Dr. Miles* case, is set out in an attempt to explain why non-signer provisions of "fair trade" laws were not exempted from the Sherman Act. The opinion was by Mr. Justice Douglas, with a concurring opinion by Mr. Justice Jackson in which Mr. Justice Minton concurred. Mr. Justice Frankfurter, with whom Mr. Justice Black and Mr. Justice Burton joined, wrote a strong dissenting opinion in which they said that it was the intention of Congress to include the non-signer clause of a fair trade law as exempt from the terms of the Sherman Act. On page 398, Mr. Justice Frankfurter said:

"The setting of the Miller-Tydings Amendment and its legislative history remove any lingering doubts. The depression following 1929 gave impetus to the movement for legislation which would allow the fixing of minimum resale prices. In 1931, California passed a statute allowing a manufacturer to establish resale prices binding only upon retailers who voluntarily entered into a contract with him. This proved completely ineffective, and in 1933 California amended her statute to provide that such a contract established a minimum price binding upon any person who had notice of the contract. Grether, Experience in California with Fair Trade Legislation Restricting Price Cutting, 24 Calif. L. Rev., 640, 644 (1936). This amendment was the so-called 'non-signer' clause which, in effect, allowed a manufacturer or wholesaler to fix a minimum resale price for his product. Every 'fair trade' law thereafter passed by any state contained this 'non-signer' clause. By the close of 1936, 14 states had passed such laws. In 1937, 28 more states passed them. Today, 45 out of 48 states have 'fair trade' laws. See Report of the Federal Trade Commission on Resale Price Maintenance XXVII (Dec. 13, 1945).

"A substantial obstacle remained in the path of the 'fair trade' movement. In 1911, we had decided *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S., 373. There, in a suit brought against a 'non-signer,' we held that an agreement to maintain resale prices was a 'contract * * * in restraint of trade' which was contrary to the Sherman Law. To remove this block, the Miller-Tydings Amendment was enacted. It is said, however, that thereby Congress meant only to remove the bar of the Sherman Law from agreements between the manufacturer and retailer, that Congress did not mean to make valid the 'non-signer' clause which formed an integral part of each of the 42 state statutes in effect when the Amendment was passed."

And on page 401, in the dissenting opinion, the following appears:

> "Every one of the 42 state acts which the Miller-Tydings Amendment was to 'back up'—the acts on which the Miller-Tydings Amendment was to place a 'stamp of approval'—contained a 'non-signer' provision. As demonstrated by experience in California, the state acts would have been futile without the 'non-signer' clause. The court now holds that the Miller-Tydings Amendment does not cover these 'non-signer' provisions. Not only is the view of the court contrary to the words of the statute and to the legislative history."

That case was decided May 21, 1951. Congress almost immediately (1952) passed the McGuire Act, 15 U. S. Code, Section 45. Paragraphs 2 and 3 thereof provide:

> "(2). Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any state, territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.
>
> "(3). Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or

hereafter in effect in any state, territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby."

The purpose of the McGuire Act was stated as follows:

"That it is the purpose of this Act to protect the rights of states under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce."

According to its sponsor, Representative McGuire:

"The McGuire bill is merely permissive. It says to the States, in effect, that Congress recognizes the rights of the States to enact and make effective policies respecting unfair competition. That is all the McGuire bill does and that is all it is intended to do. 98 Cong. Rec., 4979 (May 7, 1952).

"The primary purpose of the McGuire Act was to change, as to future cases, the result reached by the Supreme Court in *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U. S., 384, 71 S. Ct., 745, 95 L. Ed., 1035 * * *. H. R. Rep. 1437, 82nd Congress, 2nd Session, pp. 1-2, U. S. Code. Congressional and Administrative News 1952, pp. 2181, 2182."

The McGuire Act was almost immediately brought before the court in an action to enjoin a supermarket operator from selling a manufacturer's trademarked product below the minimum retail sale price fixed under the Louisiana Fair Trade Act. *Schwegmann Bros. Giant Super Markets v. Eli Lilly & Co.*, 205 F. (2d), 788. This case was presented on stipulations of fact, so that the issues of both the constitutionality of the McGuire Act and of the nonsigner provisions of the Louisiana Fair Trade Act were clearly presented. The court held that both acts were not subject to the appellant's claims of unconstitutionality. The headnotes provide:

> "1. Question whether distributors were to be protected under fair trade laws, as well as manufacturers or trade-mark owners, is matter addressed to legislative discretion and not subject to court review. * * *
>
> "2. Right of property owner to fix price at which he will sell is an inherent attribute of property itself and, as such, is within protection of due process clauses of federal Constitution. * * *
>
> "3. In enacting fair trade law, it was within legislative province to assume that economic laws would constitute sufficient restraint against capricious or arbitrary price fixing by producer. * * *
>
> "4. Congressional power over interstate commerce is so plenary that Congress may exercise that power by permitting states to regulate phases of interstate commerce.
>
> "5. Under Louisiana Fair Trade Law and federal statute removing ban of federal antitrust laws from price agreements made under state or territorial fair trade acts of designated type, Congress and Legislature intended that restrictions on nonsigners, when imposed as result of contract between producer and distributor, would be given effect. * * *
>
> "6. Where state and federal statutes prohibit horizontal price fixing agreements between manufac-

turers, between producers, between wholesalers, between brokers, between factors, between retailers, or between persons, firms or corporations in competition with each other, making such statutes operative against nonsigners would not make terms of such statutes self-defeating or contradictory. * * *

"7. Louisiana Fair Trade Law and federal statute removing ban on federal antitrust laws from price agreements made under state or territorial fair trade acts of designated type are not violators of due process clauses of federal Constitution on grounds of lack of substantial relation to public welfare and delegation of legislative power to private individuals. * * *"

The Supreme Court of the United States refused certiorari, 346 U. S., 856.

The state of Virginia passed a fair trade act which, by subsequent amendment, contained a non-signer clause. In *Benrus Watch Co., Inc., v. Kirsch*, 198 Va., 94, 92 S. E. (2d), 384, this provision was the subject of an action in which its constitutionality was challenged. The trial court came to the conclusion, along with other reasons for striking down this clause, that the non-signer provision was unconstitutional; but, upon appeal, the Supreme Court of Appeals held that the fair trade act had been repealed by implication by the passage of the "Anti-Monopoly Act of 1950." A new "fair trade act" was passed in 1958. Its provisions were immediately tested in the case of *Standard Drug Co., Inc., v. General Electric Co.*, 202 Va., 367, 117 S. E. (2d), 289. The new act did not contain the so-called "coercive non-signer" provision, but in its stead incorporated a provision that the Supreme Court of Appeals designated as a "permissively contractual provision." While the facts stipulated in the pleadings show that the Standard Drug Company bought the flashbulbs directly from General Electric, there was no direct contract controlling the resale price to others. Standard, however, had

direct notice before the purchase of the bulbs that General Electric was "fair trading" its flashbulbs in Virginia, and it also had notice of the required resale price under the Fair Trade Act. The headnotes of the case, reported in 117 S. E. (2d), 289, in part, provide:

"1. Where retailer contracted directly with manufacturer of trademarked flashbulbs, and, when purchase was made, retailer by expressed terms of contract agreed not to resell at less than specified minimum prices, retailer could not justly complain, in proceeding for declaratory judgment, that Fair Trade Act is unconstitutional, because retailer was not free to use and impair the goodwill of the manufacturer by selling flashbulbs at a price less than retailer agreed to maintain. * * *

"* * *

"3. The Fair Trade Act, which does not contain a 'non-signer' provision, does not violate the equal protection clause of the Fourteenth Amendment to the federal Constitution. * * *

"* * *

"5. The Fair Trade Act, which does not contain a 'non-signer' provision, does not violate constitutional provision that the legislative power shall be vested in a General Assembly, on ground that it delegates legislative power to private persons. * * *

"6. 'Goodwill' of manufacturer or producer is that intangible property right or asset created in public mind by skill, experience, dependability, and integrity of manufacturer or producer of a commodity, and trade-mark or trade name is the symbol of those qualities and constitutes an inseparable part of the 'goodwill.'

"7. The owner or proprietor of goodwill symbolized by his trade-mark is entitled to protection in his property right, and commodities bearing and identified by trademark, brand, or name of producer or

distributor and in free and open competition with commodities of same general class are proper subjects of legislative classification.

"8. The Fair Trade Act does not violate provision of the Constitution that the General Assembly shall not enact any local, special, or private law granting to any private corporation, association, or individual any special or exclusive right, privilege, or immunity. * * *

"9. Title of Fair Trade Act stating that it is an act to permit any producer or distributor to prescribe minimum resale prices of a commodity bearing trademark, brand, or name of producer or distributor if commodity is in free and open competition with commodities of the same class does not violate section of the Constitution declaring that no law shall embrace more than one subject which shall be expressed in its title. * * *

"* * *

"13. In determining the meaning of a 'contract' under the Fair Trade Act, Supreme Court of Appeals was not limited to single sentence in act defining a 'contract' but could and should look to other pertinent and explanatory parts of the act. * * *

"14. Acceptance by retailer of commodity for resale with notice attached stating its minimum retail price gives rise to a 'contract' under the Fair Trade Act, and therefore the Fair Trade Act is not in conflict with the Sherman Anti-Trust Act and void, on ground that the Fair Trade Act is in restraint of trade by authorizing price-fixing without a contract. * * *"

That case clearly holds that the Legislature may define the elements of an implied contract as coming about by conduct with knowledge of the facts upon which the agreement is based. No power to fix prices is to be found under the facts of that case, nor do the provisions of the act delegate such power to another. If the retailer does not

care to buy the manufacturer's goods on the terms the manufacturer desires to sell them, or if upon buying goods that have been "Fair-Traded" and the price fixed for resale is made known to the buyer before purchase and he does not want the goods under the conditions stipulated, there is no reason which compels the buyer to enter into a contract to buy, but if he does, he must take the goods upon the terms of the offer. Such a transaction involves the law of contracts. The retailer acts voluntarily and is not otherwise compelled to deal for or take the goods, it, of course, being a part of the provisions of the act that the goods be identified by trademark or trade name and on the market in free and open competition with goods distributed by others in the same general class.

The Supreme Court of Appeals of Virginia resolved all questions of the constitutionality of the new Fair Trade Act of Virginia in favor of the validity of the statute and affirmed the trial court in its decree enjoining Standard from violating the resale price of flash bulbs fixed under the rules of the Virginia Fair Trade Act on the theory of implied contract. This is the only case of a state court of last resort that has considered the constitutionality of a statute identical in purpose to that of the new Fair Trade Act of Ohio. All the other cases cited by the parties concerned non-signer clauses, in purposes similar to that in the former Ohio Fair Trade Act.

With the foregoing background of "fair trade" legislation and the leading cases dealing with the legislative efforts to curb "retail price cutting" of trademarked or trade-named goods sold in open competition with goods of the same general class, it must be perfectly evident that not only the great majority of state legislatures but also the Congress of the United States have determined that there is need to provide reasonable controls in this field, under

the police powers of the sovereign power. The reasons pro and con, either for or against, such legislation, are set out in great detail by the records of the hearings before the Judiciary Committees of both the House and Senate of the Ohio Legislature when considering the Fair Trade Act passed effective October 22, 1959, over the veto of the Governor by overwhelming majorities in both houses (Sections 1333.27 to 1333.34, inclusive, of the Revised Code). Whether such legislation is desirable is within the sound discretion of the Legislature, about which the courts should not be concerned except to see to it that constitutional limitations are observed and, in case of doubt such doubts should be resolved in favor of the acts of the Legislature.

Without attempting to set out in detail the arguments for or against "fair trade" laws, which now would serve no useful purpose, it might be well just to mention that those against "fair trade" legislation argue that the public is entitled to the benefit of the economies enjoyed by savings in purchasing goods at lower prices from cut-rate establishments, while, on the other hand, the proponents assert that the need to save the local small merchant, who not only sells merchandise in competition with all others but also renders service, is absolutely essential in many cases to the health and welfare of the community. It is claimed that price-cutting survives on the desire of the public to purchase known brands, this desire having been created by the manufacturer's sales efforts on the consumer level. In other words, the price-cutter capitalizes on the goodwill of the manufacturer. The claim that fixing retail prices by the manufacturer under the Fair Trade Act deprives the consumer of the benefits of competition is met by the claim that his goods must be sold in competition with other goods of the same class

under Fair Trade Acts, which fact assures the public of all reasonable benefits of competition. However, as just stated, this is a question of fact for legislative determination. The Legislature, in adopting the Fair Trade Act of 1959, defined the purpose and policy of the Act in Section 1333.27, Revised Code, as follows:

"(A) Sections 1333.27 to 1333.34, inclusive, of the Revised Code are enacted in the exercise of the police powers of the state and in pursuance of the power specifically granted the General Assembly by the people in Section 2 of Article XIII, Ohio Constitution, to regulate the sale and conveyance of personal property, and the purposes of Sections 1333.27 to 1333.34, inclusive, of the Revised Code, are generally to protect and preserve small business, to safeguard the goodwill of trademarks and trade names, to further wholesome competition, to prevent monopoly in the distribution of goods, and to promote the public welfare by securing wider distribution of commodities and an increase in the production thereof, and thereby reducing production and distribution costs, protecting and increasing gainful employment in manufacturing, wholesaling and retailing, all for the benefit of the consumer and the well-being of the citizens of the state.

"(B) It is the further purpose of Sections 1333.27 to 1333.34, inclusive, of the Revised Code, to promote the distribution in commerce in the state of identified merchandise which is in free and open competition with other articles of the same general class. Where fair, equitable, and competitive prices cannot be maintained in all appropriate stages in the distribution of such identified merchandise, the marketing of such merchandise is depressed and the quantity thereof moving in the channels of commerce in the state declines.

"(C) To remove obstructions to the marketing of identified merchandise in commerce which are oc-

casioned by unfair selling practices, it is the policy of the state to afford distributors of identified merchandise an effective means whereby the sale of such merchandise at all appropriate stages of distribution may be consummated at prices adequate to stimulate distribution and low enough to enable distributors of such identified merchandise to compete effectively with those marketing other goods, who by size and dominance may distribute such goods through their own retail outlets or by franchise or consignment methods, and to satisfy the needs of ultimate consumers."

As was stated, the first "Fair Trade Act" was passed in Ohio in 1936 at about the time of the decision of the United States Supreme Court in the *Old Dearborn* case. The first Ohio Fair Trade Act contained the so-called "non-signer" provisions. The act was challenged in 1956 in the case of *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St., 182, which was decided January 22, 1958. It should be noted that, on page 185 of the opinion, Judge Zimmerman lists some of the states where a fair trade act, including a non-signer clause, had been upheld in its entirety and a few states where the courts had come to the opposite conclusion. The date of the decision is mentioned because, after it was published, holding the non-signer provision unconstitutional as a delegation of legislative power, the Legislature, in the 103rd General Assembly, enacted Sections 1333.27 to 1333.34, inclusive, Revised Code, and in the process did not readopt the non-signer clause but, in its place, followed and somewhat enlarged on the provisions of the Virginia Act setting out the circumstances under which a buyer for wholesale or retail purposes would be bound to maintain "fair trade contracts" with the manufacturer from whom the goods were purchased as provided by the Act. This is accom-

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plished by fixing fair-trade prices by contracts with other retailers, with notice of such prices to the retailer involved, and the retailer then purchasing such articles for resale on the retail market with knowledge that under the law he has impliedly contracted to maintain fair-trade prices by the purchase of goods for resale under such circumstances. The goods, of course, must bear the trademark or trade name of the manufacturer or producer and be sold in competition with other goods of the same class. These provisions of the new act were not in issue before the Supreme Court in the *Bargain Fair* case, and, therefore, that case is not in point on the issues in these cases.

The legislative purpose in passing the "Fair Trade Act" of 1959 was to override the decision of the Supreme Court in the *Bargain Fair* case. The Legislature studiously sought to pass an Act meeting every constitutional objection pronounced by the Supreme Court in "*Bargain Fair.*" There is no purpose in any of the "fair trade" legislation to control prices collaterally. This is clearly shown by the true basic theory of the new acts of Virginia and Ohio. Here, whatever may be said of other fair trade acts, this legislation in Ohio (Sections 1333.27 to 1333.34, inclusive, of the Revised Code) provides the conduct that will create a contract controlling resale prices by the retailer whose conduct in the purchase of the goods comes within the terms of the statute. The Legislature has passed legislation of like character which has been upheld by the courts, such as defining the seller's rights under a conditional sales contract. That such a matter is subject to legislative control cannot be questioned since the Act was passed to prevent the injurious effect of price cutting to the manufacturer's goodwill (found to be a fact by the Legislature) of his trademarked or trade-named goods sold in open competition on the market with like goods sold by

others. The benefit to the retailer of trademarked goods is that created by the manufacturer's goodwill, inducing the ultimate purchaser to seek out the goods.

There can be no question that the seller of personal property, when he parts with title, parts with ownership in the goods, unless by the sales contract, either express, implied or by obligation imposed by law, the buyer agrees or assents to be bound to a particular course of conduct with respect thereto. If so, his obligation is because of a contract, not because of a limitation imposed upon the goods. The manufacturer or distributor of goods, by reason of his own efforts, may create in himself not only the property in the goods he manufactures, but, because of his special efforts as to the quality of such goods and his direct advertising of these goods, he creates in himself what is known as "goodwill" which is an attribute which he believes adds to the value of the goods. The manufacturer does not sell to the buyer any part of his goodwill upon parting with the property in the goods, except that the goods are identified by the trademark or trade name of the manufacturer, and, therefore, resale of the goods is influenced by the manufacturer's reputation and goodwill, to the retailer's benefit. In other words, the price-cutter sells with the help of the goodwill of the manufacturer, which goodwill he did not buy or help to support. If the retailer does not want this added sales inducement, all he has to do is remove identifying marks, sell the goods as his own, and the provisions of the Fair Trade Law no longer apply. Quoting from *Standard Drug Co., Inc., v. General Electric Co., supra* (202 Va., 367), at page 373, the court said, in considering *Old Dearborn Distributing Co. v. Seagram-Distillers Corp., supra*:

> "It was held that the non-signer section was not so arbitrary, unfair or unreasonable as to constitute a

denial of due process, because it dealt not with a commodity alone, but with a commodity plus its brand or trade-mark; that the vendee owns the commodity but not the goodwill that the trade-mark symbolizes; that the non-signer clause 'does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the goodwill of the vendor; and it interferes then only to protect that goodwill against injury. * * * There is nothing in the act to preclude the purchaser from removing the mark or brand from the commodity—thus separating the physical property, which he owns, from the good will, which is the property of another—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to that end.' * * *."

And, on page 375 of 202 Va., the court said:

"It appears that not only does the present Virginia act clearly meet the conditions required by *Old Dearborn* for constitutional validity (state and federal), but by elimination of the 'non-signer' provision and substitution of the provision that permits the voluntary contractual restriction on minimum resale price to be agreed upon by the manufacturer or distributor and retailer, it has removed the chief ground and reason relied upon by courts that have held Fair Trade Acts to be unconstitutional."

In the case of *Scovill Mfg. Co. v. Skaggs Pay Less Drug Stores, supra* (45 Cal. [2d], 881), the court said on page 888:

"* * * Here the acts of private parties in entering into contracts for the sale of commodities constitute the facts in contemplation of which the Legislature acted, and upon the existence of which the provisions of the enactment were to be applicable. The private contracts are no more legislative in character

than are other acts or conduct of private parties undertaken as a prerequisite to the application of a statute. The consequence that the statute has become applicable, and conduct in violation thereof has become actionable is in no way due to the exercise of any assumed legislative power on the part of the contracting parties * * *."

See, also, *Weco Products Co. v. Reed Drug Co.* (1937), 225 Wis., 474, 274 N. W., 426; and *Goldsmith v. Mead Johnson & Co.* (1939), 176 Md., 682, 7 A. (2d), 176.

Most of the litigation in the federal courts involving state fair trade acts was concerned with conflicts created by statutes. The legislative desire to curb monopolies came into conflict with the desire to support acts dealing with fair trade and to define the rights of a manufacturer to defend against the detriment suffered to its goodwill by price cutters. In no case here cited did the federal courts suggest that "non-signer" clauses constituted a delegation of legislative powers, and, in the *Old Dearborn* case, the "non-signer" clause was found not to offend state or federal constitutional provisions.

There can be no doubt that the "non-signer" provision of the first Fair Trade Act of Ohio, and now the implied-contract provision of the new Act, is the very heart of the Act and that, unless such provision can be enforced, the Act is completely useless.

From the foregoing analysis of the case law and the statutes with which they deal, and the clear purpose of the great majority of the Legislatures of the several states and the Congress of the United States to prevent "price cutting" as inimical to the common good, primarily as to the retail sale of trade-marked or trade-named goods offered for sale on the open market in competition with other goods of the same class below the price designated by the

owner of the goodwill of the goods identified by his trade name or trademark, the obligation of the retailer to maintain fair-trade prices being founded on contractual relations between the manufacturer or dealer and the retailer, as defined by the Fair Trade Act, we must conclude that the Act (Sections 1333.27 to 1333.34, inclusive, Revised Code) was passed within the constitutional powers of the Legislature of Ohio, and that its provisions violate no constitutional rights of the plaintiff or any others in a like situation.

The judgment of the Court of Common Pleas, therefore, is reversed and final judgment entered for the defendants.

Judgments reversed.

KOVACHY, *P.J.*, concurs.

HURD, J., dissenting. On this appeal, the single question presented is whether the 1959 Fair Trade Act (Sections 1333.27 to 1333.34, inclusive, Revised Code) has the effect of nullifying the decision of the Supreme Court in *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St., 182. In that case, Judge Zimmerman, at page 186, said:

"A majority of this Court has reached the conclusion that Section 1333.07, Revised Code, which prohibits those who are not parties to the stipulated-price contract from selling trade-marked items at a price lower than that stipulated by the manufacturer, is unreasonable and unenforceable and constitutes an unauthorized exercise of the police power in that there is no substantial relation to the public safety, morals or general welfare. Moreover, it contravenes the 'due process' provision of the Ohio Bill of Rights by arbitrarily and monopolistically denying a seller, who has not entered into any price-fixing contract with the

manufacturer, the privilege of disposing of his own property on terms of his own choosing, *and in addition delegates legislative power and discretion to private persons.*" (Emphasis supplied.)

In the case at bar, McNeill, J., sitting by assignment in this county, held in effect that the 1959 Fair Trade Act was subject to certain objections which the Supreme Court found to exist in the 1936 Fair Trade Act (Sections 1333.06 to 1333.10, Revised Code) for two reasons, namely, (1) that the Supreme Court in the *Union Carbide* case rejected the theory of the adequacy of proprietary interest as a basis for fair-trade legislation, and (2) that regardless of any other changes in the Act, the delegation of legislative power and discretion to private persons remains. These provisions were specifically interdicted by the Supreme Court in the *Union Carbide* case.

Inferentially, it should be noted that two other Common Pleas Courts have held that the 1959 Act is subject to certain of the objections found by the Ohio Supreme Court to exist in the 1936 Act.

In the case of *Helena Rubinstein, Inc., v. Cincinnati Vitamin & Cosmetic Distributors Co.,* 84 Ohio Law Abs., 143, Judge Gusweiler of the Common Pleas Court of Hamilton County held the 1959 Act to be unconstitutional on all the grounds asserted by the Supreme Court in the *Union Carbide* case.

The latest decision on the subject was rendered April 14, 1961, by Judge Leach of the Common Pleas Court of Franklin County in the case of *Bulova Watch Co., Inc., v. Ontario Store of Columbus, Inc.*, 86 Ohio Law Abs., 585, who held, on demurrer, in a very able opinion, that the 1959 Act is unconstitutional as a delegation of legislative power to private persons and, in that respect, comes within

the prohibition of the decision of the Supreme Court in the *Union Carbide* case. The logic and reasoning of these opinions, as well as that of McNeill, J., in the instant case, while not in any sense binding upon this Court, are, in my opinion, strongly persuasive on reason, logic and authority.

The great vice in the 1959 Act (as in the 1936 Act) is the delegation of legislative power to private persons without any proper formula, standard or control whatsoever. Thus, those who have the most to gain are granted the greatest delegation of legislative power, and private persons are permitted unlimited license to fix and set prices at will. Thus, the major effect is to permit private persons, by the delegation of legislative power, if they so determine, to increase and maintain high prices, particularly of drugs and vitamins. In the ordinary course of events, this will lead to a monopoly and make it difficult for persons of ordinary means to purchase regularly those aids to health and well-being so necessary under modern conditions. In this respect, the interests of the consuming public are totally ignored and the retailer is prevented from conducting his business as he sees fit.

Inasmuch as I am in accord with the opinion of the trial judge in the case at bar, I feel that no useful purpose would be served by a further discussion of the issues in this dissenting opinion. Therefore, I conclude that the judgment of the Common Pleas Court should be affirmed for the reasons generally set forth in the opinion of the trial judge. In so concluding, I am not unmindful of the case of *Standard Drug Co., Inc., v. General Electric Co.*, 202 Va., 367, 117 S. E. (2d), 289, discussed at great length in the majority opinion. While that case may be somewhat persuasive, it must be distinguished from the instant case in certain respects. (See the opinion of Leach,

J., in the *Bulova Watch Company* case, *supra* [86 Ohio Law Abs., 585].) Regardless of any arguments to the contrary, this Court must be bound by the decision of the Ohio Supreme Court in the *Union Carbide* case which is presently the established law of this state. It is the prerogative of the members of the Supreme Court to determine what weight it shall give to decisions of courts of sister states.

Judgment of the Court of Appeals of Cuyahoga County.

(Dated September 27, 1961.)

(Like Orders filed September 27, 1961, Case Nos. 25,371 & 25,374.)

This cause came on to be heard upon appeal on questions of law, assignment of error, bill of exceptions and exhibits thereto, transcript of the docket and journal entries in the Court of Common Pleas of Cuyahoga County, Ohio, and briefs, and was argued by counsel and submitted to the Court.

Upon consideration whereof, this Court finds as follows in the record and proceedings aforesaid:

1. Sections 1333.27 through 1333.34 of the Ohio Revised Code are valid, lawful, and enforceable enactments of the Ohio General Assembly and are neither in violation of the Constitution of the State of Ohio, nor in violation of the Constitution of the United States.

2. The Court of Common Pleas of Cuyahoga County erred to the prejudice of the appellant in declaring said sections to be in violation of the Constitution of the State of Ohio, and therefore void and not binding upon the appellee, and in granting judgment for the appellee on its petition and dismissing the cross-petition of the appel-

lant, when judgment should have been entered for the appellant on such petition and said cross-petition should not have been dismissed.

It is therefore considered, ordered, and adjudged by this Court that the judgment of the Court of Common Pleas of Cuyahoga County be and the same hereby is reversed and held for naught. And the Court coming now to render the judgment which the Court of Common Pleas of Cuyahoga County ought to have rendered, it is ordered that Sections 1333.27 through 1333.34 of the Ohio Revised Code be and the same hereby are declared to be valid, lawful, and enforceable enactments of the Ohio General Assembly and neither in violation of the Constitution of the State of Ohio nor of the Constitution of the United States; that final judgment be and the same hereby is now entered for the appellant on the petition filed in this cause in the Court of Common Pleas of Cuyahoga County by the appellee; that this cause be remanded to the Court of Common Pleas of Cuyahoga County to carry this judgment into effect and for execution, and for further proceedings according to law with respect to the cross-petition filed in this cause by the appellant; and that the appellant recover from the appellee his costs herein expended. To all of which, appellee, by counsel, excepts.

Signed: Julius M. Kovachy,

Presiding Judge.

Opinion of the Supreme Court of Ohio.

(Appeal Nos. 37,320 and 37,321.)

(Decided May 8, 1963.)

APPEALS from the Court of Appeals for Cuyahoga County.

These two causes originated in the Court of Common Pleas of Cuyahoga County, in each of which is sought a declaratory judgment that the Ohio Fair Trade Act, Sections 1333.27 through 1333.34, Revised Code, is invalid and unconstitutional. The facts in both cases are similar and the law applicable is the same. The appeals will be treated together, since the assignments of errors in both cases are exactly the same.

Hudson Distributors, Inc., a Michigan corporation, operates a number of retail stores in Cleveland. It brought these actions for the purpose of testing the constitutionality of the 1959 Ohio Fair Trade Act. In one case, Hudson named as defendant the Eli Lilly Company, and, in the other, The Upjohn Company. Both companies had complied with the Fair Trade Act, and Hudson had entered into no written contract with either. Hudson procured the merchandise of Lilly from a distributor in Detroit. Upjohn sold direct to the retailer or at times to the wholesaler. Hudson sold the merchandise for less than the fair-trade price.

In both causes, the Court of Common Pleas found that the Fair Trade Act is unconstitutional as an unlawful delegation of legislative power.

Those judgments were reversed by the Court of Appeals, and the causes are before this Court pursuant to the allowance of motions to certify the records.

GRIFFITH, J. In *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.* (1958), 167 Ohio St., 182, we deter-

mined that a prior Fair Trade Act (1936) containing a nonsigner provision was invalid. The syllabus reads:

> "Section 1333.07, Revised Code, a part of the Ohio Fair Trade Act, which prohibits those who are not parties to a price-fixing contract between the producer of a trade-marked commodity and another from selling such commodity for less than the price stipulated in such contract, represents an unauthorized exercise of the police power in a matter unrelated to the public safety, morals or general welfare, delegates legislative power to private persons, unconstitutionally denies the owner of property the right to sell it on terms of his own choosing and is invalid."

In the *Bargain Fair* case we were concerned primarily with the nonsigner provisions. Following the judgment in that case, a new Ohio Fair Trade Act (128 Ohio Laws, 698) was enacted, which act became effective October 22, 1959, and it is this legislation that is now being assaulted and is the sole cause of this controversy.

The heart of the new act, the implied contract doctrine is spelled out in Section 1333.28 (I), Revised Code. "Contract" is defined therein as "any agreement, written or verbal, or arising from the acts of the parties." That section provides further that a person who acquires a commodity "directly from the proprietor or otherwise" after actual notice that the proprietor has established a minimum resale price is bound to observe that price; and that such a person by accepting the commodity "shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor."

A person who acquires such commodity after actual notice and then sells, offers to sell or advertises to sell such commodity at a price lower than the established minimum

resale price commits an act of unfair competition. Section 1333.32 (A), Revised Code.

Section 2, Article XIII, should not be read out of the Ohio Constitution or rendered meaningless. The provision means just what it says—the General Assembly can pass laws "regulating the sale and conveyance" of personal property. The new Ohio Fair Trade Act is just such a law. The new act is much more comprehensive than the prior act and introduces into the law two entirely new concepts.

It should be pointed out at this time that one element of the act cannot be overemphasized, namely, that the act applies only to trademark items which are in free and open competition with other goods of the same nature in the same general area. This is one of the most important features of this act. The act does not restrain competition since it may only apply to merchandise which is in free and open competition with goods of a like nature.

The first of the new concepts incorporated in this new act is contained in Section 1333.31, Revised Code, which reads as follows:

> "A proprietor shall retain a proprietary interest in any commodity with respect to which he is a proprietor after he has sold it to distributors, so long as such commodity continues to be identified by his trademark or trade name, by reason of his interest in stimulating demand for such commodity through effective distribution to ultimate consumers and of his interest in continuing protection of the goodwill associated with his trademark or trade name."

By this section, the General Assembly has extended the original concept of the trademark, that of protecting the owner from others marketing their goods under his trademark, to include as a part of the ownership a continuing proprietary interest in the trademark or trade name on the merchandise to the extent that the proprietor

can control the resale price of the merchandise even after it has left his possession and ownership. It is contended that the General Assembly has no power to create such ownership. In this the opponents of this legislation fail to take into consideration that all ownership of property and the incidents relating thereto arise only as a matter of law. Inasmuch as all ownership of property arises only by law, the law may also impose such reasonable conditions and incidents of ownership as are necessary to protect not only the owner but the public in general, *i.e.*, such conditions as are necessary for the general welfare. Many such conditions are imposed by law. For example, land may be conveyed only by following the procedure prescribed by statutes, motor vehicles may be transferred only by certificate of title, and it is only because the law so provides that property may be transmitted by will. It is fundamental that property may be used only so long as its use does not interfere with the public welfare. Thus, although one may own a motor vehicle, the use thereof is subject to strict regulation. The ownership of property secured by the Constitution is necessarily subject to regulation by law. The General Assembly, after extensive and exhaustive hearings, determined that such extension of proprietary rights was necessary not only to protect the property rights incorporated in the ownership of a trademark or trade name but also to protect the small-business man and the public in general.

In such a matter, in the absence of conclusive evidence to the contrary we cannot substitute our judgment for that of the legislative body. Where the wisdom of a legislative act is debatable, the legislative determination must stand.

"Where such questions of fact [the need for fair-trade legislation] are fairly debatable, this Court does not sub-

stitute its judgment for that of the General Assembly but accepts and carries into effect its declared policy." *Kinsey Distilling Sales Co. v. Foremost Liquor Stores, Inc.*, 15 Ill. (2d), 182, 188.

This brings us to a consideration of the second of the new concepts incorporated in the new act. Section 1333.28 (I), Revised Code, reads as follows:

> "'Contract' means any agreement, written or verbal, or arising from the acts of the parties. The establishment by a proprietor of a minimum resale price for any commodity pursuant to the provisions of Section 1333.29 of the Revised Code and the proprietor's permission for a distributor to acquire and use the proprietor's interest in the trademark or trade name in reselling the commodity shall constitute a contract and sufficient consideration from the proprietor for a promise by the distributor not to sell such commodity at less than the minimum price established by the proprietor. Any distributor (whether he acquires such commodity directly from the proprietor or otherwise) who, with notice that the proprietor has established a minimum resale price for a commodity, accepts such commodity shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor."

This provision is the core of the act. When read in conjunction with the rest of the act, it provides in essence that, when a retailer with notice that an item has been fair-traded procures it for resale, he is deemed to have entered into an implied contract with the owner of the trademark that he will sell the item at the fair-trade price.

There is no question that express price maintenance contracts are valid. *Garst v. Harris*, 177 Mass., 72; *Grogan v. Chaffee*, 156 Cal., 611.

The statute creates an implied contract by act of the parties. The doctrine of implied contracts is almost as old as the law of contracts. The simple illustration of the appellees that, where one takes a candy bar from a grocer's shelf and eats it, he obligates himself to pay for it is a basic example of an implied contract by act. No word need be said; conduct creates the contract.

It must be remembered that there is no compulsion on a retailer to handle the trademarked goods. Since the act applies only to goods which are in free and open competition with goods of the same nature, he may select other goods for sale. If he selects the fair-trade goods, it is his voluntary act, and he must abide by the conditions imposed thereon by the proprietor. The fact that he may not like the conditions is inconsequential. Most of us are forced by circumstances to enter into contracts where we do not like the conditions imposed on us, yet if we voluntarily accept the merchandise we must abide by the conditions attached thereto. For example, in purchasing a home, there are in most instances restrictive covenants as to use. We may not like such conditions, but if we accept the contract we must abide thereby. Liking or not liking the conditions of acquiring property has no effect on the validity of the contract. If the retailer chooses to accept the goods, he is bound by the conditions imposed thereon, in this instance, the fair-trade price.

It is stated as follows in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S., 183, 193, 194:

> "Appellants here acquired the commodity in question with full knowledge of the then-existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not ob-

liged to buy; and their voluntary acquisition of the property with such knowledge carried with it, upon every principle of fair dealing, assent to the protective restriction, with consequent liability under Section 2 of the law by which such acquisition was conditioned. Cf. *Provident Institution v. Jersey City*, 113 U. S., 506, 514-515; *Vreeland v. O'Neil*, 36 N. J. Eq., 399, 402; same case on appeal, 37 N. J. Eq., 574, 577."

Once trademarked goods come into Ohio the law imposes certain conditions thereon, and they are held subject to those conditions.

Legislative conditions and contracts are not new in the law, they appear in many instances, and once the parties enter into an agreement they are bound by the legislative contract no matter what the parties intended. This is exemplified in the law relating to insurance contracts wherein statutory provisions and conditions are imposed in every insurance contract no matter what the intent of the parties. This is true as to statutory bonds, negotiable instruments, bulk sales and mechanics' liens.

This provision of the law is essentially very simple. It is simple contract law. The owner of a trademark offers his goods bearing that mark which are in free and open competition in the open market for resale, on condition that the retail price be maintained at a certain level. This is basic contract law; an offer may be made on condition. Under the Ohio law, the owner of the trademark, once the goods enter into Ohio, has by statute sufficient interest to control the resale price of the goods. The acceptance of this offer is purely voluntary, but if it is accepted it must be accepted on the imposed conditions or not at all. If the offer is accepted, the retailer in consideration of the good-will attached to the trademark and the demand created by the owner thereof contracts to sell it at the agreed price.

We come now to a consideration of the power of the General Assembly to enact these sections. The avowed legislative purpose is contained in Section 1333.27, Revised Code, which reads as follows:

"(A) Sections 1333.27 to 1333.34, inclusive, of the Revised Code, are enacted in the exercise of the police powers of the state and in pursuance of the power specifically granted the General Assembly by the people in Section 2 of Article XIII, Ohio Constitution, to regulate the sale and conveyance of personal property, and the purposes of Sections 1333.27 to 1333.34, inclusive, of the Revised Code, are generally to protect and preserve small business, to safeguard the goodwill of trademarks and trade names, to further wholesome competition, to prevent monopoly in the distribution of goods, and to promote the public welfare by securing wider distribution of commodities and an increase in the production thereof, and thereby reducing production and distribution costs, protecting and increasing gainful employment in manufacturing, wholesaling and retailing, all for the benefit of the consumer and the well-being of the citizens of the state.

"(B) It is the further purpose of Sections 1333.27 to 1333.34, inclusive, of the Revised Code, to promote the distribution in commerce in the state of identified merchandise which is in free and open competition with other articles of the same general class. Where fair, equitable, and competitive prices cannot be maintained in all appropriate stages in the distribution of such identified merchandise, the marketing of such merchandise is depressed and the quantity thereof moving in the channels of commerce in the state declines.

"(C) To remove obstructions to the marketing of identified merchandise in commerce which are occasioned by unfair selling practices, it is the policy of the state to afford distributors of identified mer-

chandise an effective means whereby the sale of such merchandise at all apppropriate stages of distribution may be consummated at prices adequate to stimulate distribution and low enough to enable distributors of such identified merchandise to compete effectively with those marketing other goods, who by size and dominance may distribute such goods through their own retail outlets or by franchise or consignment methods, and to satisfy the needs of ultimate consumers."

Whether such conditions and controls are within the police power as declared by the General Assembly must be determined by an examination of known economic conditions.

Even to the most casual observer it is readly apparent that the small independent merchant is gradually being forced out of business through the operation of the large merchandising establishments. Even without discounting fair-trade items, these large merchants through their tremendous buying power are able by quantity buying to legitimately undersell the small merchant and to attract his trade. When, in addition to this legitimate underselling, the discounter uses fair-trade items as a come-on, selling items at cost or even at a loss to entice customers into his store, it is apparent that the small merchant will be doomed, he cannot afford to compete on this level, and his customers will go to the discounter to buy. Yet this small independent merchant is a necessary and integral part of the community. It is to him that the consumer turns for little-called-for items that the discounter does not choose to handle, and quite frequently it is to him that the customer turns for the personal service not rendered by the large discount establishments. Yet, as a result of the discounting of fair-trade merchandise, so much of his trade is being drained from him that he can-

not afford to continue his business. Clearly, it is to the advantage of the general public that such establishments be preserved.

So much for the small-business man. We turn now to a consideration of the right to protect the owner of the trademark. It is beyond question that the goodwill of a trademark is a valuable property right. In *McLean v. Fleming*, 96 U. S., 245, 252, the court said:

> "Everywhere courts of justice proceed upon the ground that a party has a valuable interest in the goodwill of his trade, and in the labels or trademark which he adopts to enlarge and perpetuate it. Hence it is held that he, as proprietor, is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same, by using his labels and trademark without his consent and authority."

The majority of present-day consumer purchasing is by brand name. Today the public demand necessary for retail selling is created to a great extent not by the retailer but by the manufacturer, the owner of the trademark. One of the greatest expenses of modern day merchandising is the creation of the demand for the product. This expense, which is borne in a great part by the proprietor, at times may even exceed the original manufacturing cost of the product itself. The value of any trademark is, of course, the demand for the product which it represents. The continued discount selling of a trademarked product eventually cheapens it in the eyes of the purchasing public. If such product is sold at a reduced price the public will eventually get the idea that the product is cheap and turn to others, seeking higher quality merchandise. It does not occur to them that the quality is good and that the discounter is using the merchandise as a loss leader

to advertise his store. This fact is well borne out by the fact that it is the owner of the trademark who urges that his merchandise be fair-traded. If discount selling did not injure his total sales, he would have no interest in the retail price. It must be remembered that the proprietor sells his goods at the same price and reaps the same unit profit no matter what price the ultimate consumer pays. Clearly, the owners of trademarks have discovered that discount selling of their products eventually cheapens them in the eyes of the public with the ultimate effect of injuring the value of the trademark or trade name and reducing their total sales. See *National City Bank v. National City Window Cleaning Co.*, 174 Ohio St., 510.

When the general welfare of the small merchant is considered together with the necessity of protecting the goodwill and value attached to a trademark, it was clearly within the legislative power to enact such protective legislation, and the court will not substitute its judgment in this instance for that of the General Assembly. In *Old Dearborn v. Seagram, supra,* at pages 195 and 196, the court said:

> "There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the goodwill and business of the producer and distributor of identified goods, but injurious to the general public as well. The evidence to that effect is voluminous; but it would serve no useful purpose to review the evidence or to enlarge further upon the subject. True, there is evidence, opinion and argument to the contrary; but it does not concern us to determine where the weight lies. We need say no more than that the question may be regarded as fairly open to differences of opinion. The legislation here in question proceeds upon the former and not the latter view; and the legislative determination in that respect, in the circumstances here disclosed, is conclusive so far as

this court is concerned. Where the question of what the facts establish is a fairly-debatable one, we accept and carry into effect the opinion of the Legislature."

Two other matters are urged as to the constitutionality of this legislation.

The first of these relate to the delegation of legislative power as to price fixing.

In the first place, this is not price fixing as commonly understood in the law. Here we have the producer of a commodity, which is in free and open competition with other goods of the same nature, fixing the price only of his own commodity; and not a fixing of prices for all the commodities in the same field. Here if a producer fixes his prices too high the consumer will turn to other producers for his needs.

Second, this is not legislative price fixing but price maintenance contracts between the producer and retailer, and the fact that such a contract may in some instances be implied does not affect the validity of the act. We have already found that such contracts are valid. Thus, this contention is not well founded.

The final contention is that such act violates the constitutional right of one to sell his own property on his own terms. It having been determined that the implied contracts herein are valid, the retailer takes the goods on the conditions of the offer and thus voluntarily agrees to comply with the fair-trade price.

The General Assembly has re-enacted fair-trade laws in Ohio. In so doing it met constitutional objections to the former act (1936) expressed by this Court in the *Bargain Fair* case. The nonsigner provision of the old law was eliminated. A retailer will be bound to fair-trade a product only by his own contract, either a written contract or a

contract implied under the specific statutory language from the retailer's conduct in accepting the product for resale after notice of its being subject to fair trade.

It is the intention of the new act to declare and protect the proprietary interest of a manufacturer in his trademark and the goodwill attached to it. Cf. *National City Bank v. National City Window Cleaning Co., supra.* The means employed by the act is the long and well established legal doctrine of implied contract. None of the constitutional attacks on this new act have merit.

For the reason that fewer than six members of the court are of the opinion that the Fair Trade Act is unconstitutional, the court cannot so declare it. Section 2, Article IV, Constitution.

The judgments of the Court of Appeals are affirmed.

Judgments affirmed.

TAFT, C. J., and HERBERT, J., concur.

ZIMMERMAN, MATTHIAS, O'NEILL and GIBSON, JJ., dissent.

ZIMMERMAN, J., dissenting. The writer dissents for the reason that, in his opinion, the new Fair Trade Act (Section 1333.05 *et seq.*, Revised Code) possesses the same vulnerability as did the old act since, in effect, it attempts arbitrarily to bind nonsigners of price-fixing contracts by artificial and unauthorized legislative fiat and undertakes to control the price at which trademarked merchandise may be sold by the purchasers thereof, who bear no relationship whatsoever to the producers of such merchandise.

In my view, the reasons for holding a part of the old act unconstitutional, as expressed in the case of *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio

St., 182, 147 N. E. (2d), 481, are still valid in relation to the new act.

MATTHIAS, O'NEILL and GIBSON, JJ., concur in the foregoing dissenting opinion.

Judgment of the Supreme Court of the State of Ohio.
(Dated May 8, 1963.)

(Like Orders filed May 8, 1963, in appeal, Case Nos. 37,320 and 37,321.)

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the defendant appellee recover from the plaintiff appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

APPENDIX B.

Statutes Involved.

Ohio Fair Trade Act of 1959

(Ohio Revised Code Sections 1333.27 through 1333.34)

Sec. 1333.27. (A) Sections 1333.27 to 1333.34, inclusive, of the Revised Code are enacted in the exercise of the police powers of the state and in pursuance of the power specifically granted the general assembly by the people in Section 2 of Article XIII, Ohio Constitution, to regulate the sale and conveyance of personal property, and the purposes of sections 1333.27 to 1333.34, inclusive, of the Revised Code, are generally to protect and preserve small business, to safeguard the good will of trade-marks and trade names, to further wholesome competition, to prevent monopoly in the distribution of goods, and to promote the public welfare by securing wider distribution of commodities and an increase in the production thereof, and thereby reducing production and distribution costs, protecting and increasing gainful employment in manufacturing, wholesaling and retailing all for the benefit of the consumer and the well-being of the citizens of the state.

(B) It is the further purpose of sections 1333.27 to 1333.34, inclusive, of the Revised Code, to promote the distribution in commerce in the state of identified merchandise which is in free and open competition with other articles of the same general class. Where fair, equitable, and competitive prices cannot be maintained in all appropriate stages in the distribution of such identified merchandise, the marketing of such merchandise is depressed and the quantity thereof moving in the channels of commerce in the state declines.

(C) To remove obstructions to the marketing of identified merchandise in commerce which are occasioned by unfair selling practices, it is the policy of the state to afford distributors of identified merchandise an effective means whereby the sale of such merchandise at all appropriate stages of distribution may be consummated at prices adequate to stimulate distribution and low enough to enable distributors of such identified merchandise to compete effectively with those marketing other goods, who by size and dominance may distribute such goods through their own retail outlets or by franchise or consignment methods, and to satisfy the needs of ultimate consumers.

Sec. 1333.28. As used in sections 1333.27 to 1333.34, inclusive, of the Revised Code:

(A) "Commodity" means any subject of commerce.

(B) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.

(C) "Wholesaler" means any person selling a commodity other than a producer or retailer.

(D) "Retailer" means any person engaged in business selling a commodity to consumers for use.

(E) "Distributor" means any person who acquires a commodity for the purpose of resale.

(F) "Person" means an individual, corporation, partnership, association, joint-stock company, business trust, or any unincorporated organization.

(G) "Trade-mark" means any word, name, symbol, or device, or any combination thereof, used by a producer or distributor to identify his commodity and distinguish it from that produced or distributed by others.

(H) "Trade name" means personal names, and any word, words, symbol, or symbols, used by producers or

distributors to identify their companies, firms, or corporations.

(I) "Contract" means any agreement, written or verbal, or arising from the acts of the parties. The establishment by a proprietor of a minimum resale price for any commodity pursuant to the provisions of section 1333.29 of the Revised Code and the proprietor's permission for a distributor to acquire and use the proprietor's interest in the trade-mark or trade name in reselling the commodity shall constitute a contract and sufficient consideration from the proprietor for a promise by the distributor not to sell such commodity at less than the minimum price established by the proprietor. Any distributor (whether he acquires such commodity directly from the proprietor or otherwise) who, with notice that the proprietor has established a minimum resale price for a commodity, accepts such commodity shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor.

(J) "Notice" means actual notice given by any method provided in section 1333.30 of the Revised Code, or otherwise established by legally admissible evidence.

(K) "Proprietor" means:

(1) A person who identifies a commodity produced by him by the use of his trade-mark or trade name, unless he has specifically granted to another person sole authority to establish minimum resale prices for such commodity;

(2) A person who identifies a commodity distributed by him by the use of his own trade-mark or trade name;

(3) A person who has been specifically granted by the producer or distributor of a commodity which is identified by the trade-mark or trade name of such

producer or distributor the sole authority to establish minimum resale prices for such commodity in the state.

Sec. 1333.29. (A) It shall be lawful, anything in sections 1331.01 to 1331.14 of the Revised Code or otherwise provided in the Revised Code to the contrary notwithstanding, for a proprietor to establish and control by notice to distributors or by contract, stipulated minimum resale prices for a commodity of which he is the proprietor and which is in free and open competition with commodities of the same general class produced by others and offered for sale in the same general market area. Such minimum resale prices may be differentiated as to various levels of distribution, provided such differentiations are not otherwise unlawfully discriminatory. Such prices may be changed from time to time by written notice to distributors who acquired such commodity with notice of any established minimum resale price. A proprietor may so establish such minimum resale prices for his wholesale distributors, notwithstanding section 1333.34 of the Revised Code, even though he sells such commodity to retailers in competition with such wholesale distributors, if such sales to retailers are made at prices not less than those he establishes for such wholesale distributors for comparable sales.

(B) Any such contract or notice may contain the following provisions:

(1) That the buyer will not resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which the buyer resells the same;

(2) That the buyer will require from any distributor to whom he may resell such commodity an agreement that such distributor will not, in turn,

resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell;

(3) That the seller will require from any other distributor to whom he may sell other items of such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell.

(C) Any contract or notice authorized by and entered into pursuant to any of the provisions of sections 1333.27 to 1333.34, inclusive, of the Revised Code, shall be for the benefit of the proprietor and any distributor who is bound by a similar contract or notice.

Sec. 1333.30. Actual notice of stipulated minimum resale prices may be given to any person by mail, through advertising, or through notice attached to merchandise, to containers, packages, or dispensers thereof, or on the invoice therefor, or imparted orally. Deposit in the United States mail, with postage prepaid, of a letter properly addressed to a distributor and specifying minimum resale prices established by a proprietor shall constitute prima facie evidence of actual notice to said distributor of such resale prices. The acquisition of or dealing in merchandise clearly marked, or enclosed in containers, packages or dispensers clearly marked, or the invoice for which was clearly marked, with minimum resale prices established by a proprietor shall be conclusive evidence of actual notice of such minimum resale prices. Actual notice may

also be otherwise established by legally admissible evidence. A person with actual notice of any applicable minimum resale price is thereby charged with notice that such a price is subject to change.

Sec. 1333.31. A proprietor shall retain a proprietary interest in any commodity with respect to which he is a proprietor after he has sold it to distributors, so long as such commodity continues to be identified by his trade-mark or trade name, by reason of his interest in stimulating demand for such commodity through effective distribution to ultimate consumers and of his interest in continuing protection of the good will associated with his trade-mark or trade name.

~~Sec. 1333.32.~~ (A) Except as provided in section 1333.33 of the Revised Code, it shall be unlawful and an act of unfair competition for any distributor with notice that a proprietor has established a stipulated minimum resale price for a commodity of which he is the proprietor or for any distributor who is in contract with a proprietor not to sell a commodity for which such proprietor has established a stipulated minimum resale price, at less than such stipulated minimum resale price to sell, offer to sell, or advertise such a commodity for sale at a price lower than such stipulated minimum resale price. In determining whether the sale or offer to sell or advertisement for sale of any commodity is below the stipulated minimum resale price established by the proprietor for such commodity there shall be deducted from the price at which such commodity is sold, offered for sale, or advertised for sale the value of any article or thing of exchange or extrinsic value or any concession made, whether by the giving of coupons or otherwise, which is given or to be given in connection with

such sale or offering to sell and the sale or offering for sale of such commodity with any other commodity for a single or combined price, or the giving of or offering to give any credit or allowance in excess of the actual market value thereof, or the failure to add any tax occasioned by or upon the sale of such commodity shall also be taken into consideration in determining whether such sale, offer to sell, or advertisement for sale is below the minimum resale price stipulated for such commodity by the proprietor; provided the allowance by a distributor to his customers of trading stamps or other redeemable certificates, when the amount or value of such allowance does not exceed three per cent of such stipulated minimum resale price, where the posted or advertised price of any commodity or commodities is not less than the stipulated minimum resale price thereof, shall not constitute the offering or making of a gift or concession prohibited by this section nor a violation of any of the provisions of sections 1333.27 to 1333.34, inclusive, of the Revised Code.

(B) Any person suffering or reasonably anticipating damage by reason of a violation of this section may bring suit in any court of competent jurisdiction in the state to

(1) Recover the amount of damages sustained as a result thereof;

(2) Obtain injunctive relief whether or not specific monetary damages are established;

(3) Recover the costs of suit, including reasonable attorney fees, which costs and attorney fees may be recovered whether or not specific monetary damages are established.

(C) It shall be no defense to a prayer for an injunction in any such action that there is an adequate remedy at law.

Sec. 1333.33. It shall be a defense to an alleged violation of section 1333.32 of the Revised Code, for a distributor to prove that a commodity has been advertised, offered for sale, or sold:

(A) In closing out such distributor's stock of such commodity for the bona fide purpose of discontinuing dealing in such commodity and plain notice of that fact is given to the public; provided, the distributor of such stock shall give to the proprietor of such commodity prompt and reasonable notice in writing of his intention to close out such stock, and an opportunity to purchase such stock of such commodity at the original invoice price;

(B) When the stock of such commodity is altered, secondhand, damaged, defaced, or deteriorated and plain notice of that fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and affixed to the commodity;

(C) By an officer acting under an order of court;

(D) After the distributor has removed from such commodity all trace of the proprietor's identifying trade-mark or trade name and that in such sale or offer to sell or advertisement for sale no statement, representation, or suggestion of any kind is made which would identify such commodity with the trade-mark or trade name of the proprietor.

Sec. 1333.34. Sections 1333.27 to 1333.34, inclusive, of the Revised Code, shall not, except as otherwise specifically provided in section 1333.29 of the Revised Code, apply to any contract, agreement, or understanding between or among producers, or between or among distributors, or between or among wholesalers.

Miller-Tydings Act.

"*Section 1.* **Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal:** *Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914; Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.* * * *"

The McGuire Act.

"*Sec.* 5. (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the persons so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other."